Supreme Court, U.S.
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In the
Supreme Court of the United States

ALAN MIKELL,
CHRISTOHER GRISEL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did a scheme to defraud which had as an object the sale of a commodity subject to a security interest cause a loss of property to the secured party and a gain by the defendants sufficient to satisfy the property element of the wire fraud statute, 18 USC §1343?

2. Did the Government's change in its theory of prosecution on appeal in order to argue that the property element of wire fraud, 18 USC §1343, had been established at trial, violate this Court's rule in *Steagald v United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1991), that the government loses its right to make factual assertions on appeal when it has made contrary assertions in the lower court?

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Now come Alan Mikell, lead Petitioner, by his attorney Harold Gurewitz and Christopher Grisel, Petitioner, by his attorney Douglas Mulkoff, and respectfully Petition this Court to issue a Writ of Certiorari to the Sixth Circuit Court of Appeals for the reasons discussed below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and appears at 84 Fed. Appx. 485 (6th Cir. 2003). A copy of the Opinion is included in the Appendix at Appendix A at 2a. A copy of that Order denying the petition for rehearing is included in Appendix A at 1a. The Opinion of the United States District Court for the Eastern District of Michigan is reported at 163 F. Supp. 2d 720 (E.D. MI. 2001). A copy of the District Court Opinion is included in the Appendix A at 11a.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit reversing the trial court's judgment of acquittal, was entered on December 1, 2003 and its Order denying Petitioner's Motion for Rehearing was entered on January 9, 2004. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 USC § 1254(1) and § 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Wire Fraud
18 USC § 1343

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be

transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds, for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Laundering of monetary instruments
18 USC § 1956(h)

Any person who conspires to commit any offense defined in this section of section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

Motion for Judgment of Acquittal
Rule 29(c) After Jury Verdict or Discharge

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later, or within any other time the court sets during the 7-day period.

(2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE DISTRICT COURT

Petitioner Alan Mikell was tried on a fifty-two count Second Superseding Indictment along with Petitioner Christopher Grisel. The Indictment charged money laundering, wire and mail fraud offenses and forfeiture, all involving the operation of a small cheese manufacturing plant in Pinconning, Michigan from 1994 until its close in 1996. The indictment alleged four schemes to defraud and four separate victims. The National Farmers Organization (NFO), a national farmers co-operative that was the only supplier of milk to the plant during the later period of the plants' operation, was the alleged victim of one of the four schemes. Count 1, charging money laundering conspiracy, and other money laundering counts alleged that the property involved in unlawful financial transactions was the proceeds of the wire fraud offenses concerning NFO. Following a fourteen week trial, Petitioner Mikell was found guilty on Counts 1-5, 7-8, 25, 27, and 52 of money laundering conspiracy, money laundering, wire fraud, and forfeiture, all concerning NFO and the sale of the plants' remaining cheese inventory after the plant ceased operations in January, 1996. Petitioner Mikell was found not guilty on all other counts. Petitioner Grisel was found guilty on Counts 1-11, 13-20, 22-24 and 29. He was found not guilty on all other counts.

Petitioners filed motions for judgment of acquittal after the jury verdict pursuant to Rule29(c) FRCrP and argued that trial evidence failed to establish proof of the property element of wire fraud and that the money laundering counts should be dismissed because without proof of wire fraud, there were no proceeds. Petitioners argued there was a failure of proof that NFO lost property because (1) the cheese inventory remaining

at the plant when closed was owned by the cheese plant and not by NFO; (2) the money derived from the sale of the cheese inventory was not the property of NFO; and, (3) the security interest of NFO in the cheese inventory was subordinate to prior creditors of the cheese plant and had no value. Petitioners also moved for arrest of judgment pursuant to Fed. R. Crim. P. 34 and argued that venue for the money laundering and some of the wire fraud offenses was improper in the Eastern District of Michigan. The District Court granted Petitioners' motions on September 24, 2001 on all remaining counts. It held that venue was improper on Counts 8-11, 13-20, 22-24, 27 and 29. It also held that the wire fraud counts and the money laundering conspiracy charge in Count 1 should be dismissed because of insufficient proof of wire fraud.

The District Court granted the motions for acquittal and based its decision on the Government's theory of its case, that the several businesses which operated the cheese plant from 1994 to 1996 were but a single entity and, therefore, that NFO's lien was subordinate to other creditors. According to the District Court: "whether this averment [multiple names] is necessarily true is irrelevant; the Court must look at the evidence in the light that is most favorable to the government and accept the Government's reasonable presentation of the facts. Thus, following the Government's contentions, the Court finds that two creditors, Dore and Earthsafe [prior owners of the cheese plant in 1994 and 1995] secured their rights before NFO." The District Court also relied on its instruction to the jury which required the jury to determine whether the NFO security interest was affected by prior creditors and concluded as follows:

> "The evidence reveals that Dore was owed a secured debt worth over $3 million and that Earthsafe was

owed a secured debt worth at least $850,000. Considering the evidence that the cheese costs at most $1.40 per pound, the 771,338.9 pounds at issue was worth only approximately $1 million. Thus, NFO's security interest had no value because the combination of Dore's and Earthsafe's accounts exceeded the market value of the cheese at issue."

B. THE COURT OF APPEALS RULING

The United States appealed from the District Courts' decision concerning Counts 1 through 7 and argued that the District Court erred by finding that NFO's security interest in the cheese plant's inventory was insufficient to support the wire fraud convictions. The United States did not appeal from the District Court decision finding improper venue on other counts.

The United States Court of Appeals for the Sixth Circuit filed its Opinion on December 1, 2003, reversing the District Court's judgment of acquittal and ordered the case remanded to the District Court for consideration of an undecided new trial motion. It rejected the District Court's legal and factual analysis that the NFO security interest was subordinate to prior creditors of the cheese plant. Instead, it concluded that claims of prior cheese plant creditors were against assets of different entities and, therefore, that the District Court erred by finding the NFO security interest did not satisfy the property element of the wire fraud statute.

The Circuit Court Opinion failed to address Petitioners' contention that the Government should be precluded from arguing for the first time on appeal that an intangible security interest can establish property for proof of wire fraud when its

theory in the District Court was that the object of the scheme to defraud NFO was money.

The Court of Appeals denied Petitioner Mikell's Motion for Rehearing on January 9, 2004. Petitioner Mikell argued in that motion that the Circuit Court Opinion contains factual errors, that the NFO security interest was not property sufficient to satisfy the proof element of the wire fraud statute because it was valueless at the time the cheese inventory was sold in 1996, and that the Circuit Court's conclusion was based on theories which were contrary to the government's theory of its case in the District Court.

C. THE NFO SECURITY INTEREST

NFO's security interest in the cheese plant inventory was created by a Collateral Pledge and Security Agreement entered into on September 26, 1995, about four months before the cheese plant closed. It was entered into between the operating entity of the cheese plant, Real Pinconning Cheese, LLC (RPC), and the NFO Members' Dairy Custodial Account, an Iowa trust (NFO). The NFO Trust was a separate legal entity established by NFO to collect money from milk sales and to disburse the receipts to its members who sold their milk through NFO. Three additional agreements were made at about the same time which limited the scope of the NFO Trust security interest, including the NFO Trust's waiver of all interest in proceeds.

First, a factoring agreement was made between RPC and Concord Growth Corporation., a factor, dated September 5, 1995. That agreement provided for the sale of some receivables by RPC to Concord and granted Concord a security interest in all personal property of RPC, including its inventory. Second, RPC entered into a Credit and

Assignment Agreement with Concord on September 26, 1995 which authorized Concord to manage RPC's receivables. That agreement provided for a restricted account to collect all RPC receivables, whether or not factored. The agreement described RPC as the owner of the restricted account and stated that there are no intended third-party beneficiaries of the agreement. Finally, a Subordination Agreement was entered into between Concord and the NFO Trust to establish the interests of Concord and the NFO Trust in RPC's cheese inventory. In the Subordination Agreement, the NFO Trust acknowledged Concord's prior security interest and agreed to limit its first priority lien status to the first $350,000 of RPC's inventory. The agreement accorded Concord preference over the NFO Trust for any amount of inventory over $350,000 in value. In the Subordination Agreement, the NFO Trust gave up all interest in proceeds of the cheese inventory. The agreement states that "... Concord shall have the sole and priority lien on all proceeds from the sale of the collateral, by Real, including accounts receivable of Real and NFO shall have no interest therein." Pursuant to this Agreement, therefore, the NFO Trust agreed to a first security interest only up to $350,000 of inventory. It also agreed to give up all interest in proceeds from the sale of that inventory.

D. The Sale of the Real Pinconning Cheese Inventory

On January 3, 1996, NFO advised RPC that it would discontinue milk deliveries. The last NFO milk delivery was received at the plant on January 10, 1996, and after processing that milk to cheese, the plant ceased operations. RPC then had an inventory of approximately one million pounds of cheese. Approximately 220,000 pounds of cheese were sold to regular RPC customers at $1.39 per pound, close to market price. Attempts were made by Grisel and Mikell to

sell the remaining cheese, which included discussions with a South Dakota cheese broker Ronald Hines of the Nor-tech Dairy Advisors who offered 25¢ per pound. Hines arranged for three trucks to arrive at the Pinconning, Michigan warehouse on Sunday, January 14, 1996 to begin removing cheese. On that morning, NFO's local counsel obtained a restraining order and served it at the plant. Following a lengthy telephone conference including Petitioner Mikell and Petitioner Grisel along with representatives of NFO, the parties agreed to terms by which the cheese could be shipped. The parties agreed that the money from the sale of the cheese would go through the Concord account and that RPC would provide NFO with identification of purchasers, quantities and pricing of the remaining inventory.

On Monday, January 15, 1996, Grisel met with Hines at his office in South Dakota and agreed to purchase the cheese inventory sold to Hines at the price of 30¢ per pound through his separate company, InnoQuest. InnoQuest in turn sold the cheese to E.J. Marketing, a prior customer of RPC, and to other prior RPC customers at about $1.36 per pound.

The evidence at trial also established that on January 15, 1996 a shipping schedule was faxed to NFO showing delivery of 11 truckloads of cheese to Nor-tech at a price to be determined. NFO's legal representative testified at trial that he was not told on January 15, 1996 that the cheese would be sold at substantially less than market price, that he was told the cheese would be sold at market price, and that he did not learn of the actual sale price to Nor-tech until February 20, 1996 when Nor-tech wired $186,670.91 to Concord's bank account pursuant to the Credit and Assignment Agreement between Concord and RPC. After deductions for money owed to Concord, Concord forwarded approximately $152,000 to NFO. NFO's attorneys deposed Hines on April

2, 1996 and learned that he sold the cheese to InnoQuest for 34¢ per pound including expenses.

Approximately $730,000 from the sale of the cheese by InnoQuest was deposited into a separate bank account under Grisel's control. Money was disbursed from that account to pay creditors of RPC, other than NFO, including $10,000 to Petitioner Mikell.

REASONS FOR GRANTING THE WRIT

I. A SCHEME TO DEFRAUD WHICH HAD AS AN OBJECT THE SALE OF A COMMODITY SUBJECT TO A SECURITY INTEREST DID NOT CAUSE A LOSS OF PROPERTY TO THE SECURED PARTY AND A GAIN BY THE DEFENDANTS SUFFICIENT TO SATISFY THE PROPERTY ELEMENT OF THE WIRE FRAUD STATUTE, 18 USC § 1343.

A. IT IS NECESSARY THAT THE OBJECT OF A SCHEME TO DEFRAUD IN VIOLATION OF 18 USC § 1343 WHICH IS INTANGIBLE PROPERTY MUST BE A GAIN TO THE DEFENDANT AND LOSS TO THE VICTIM.

The wire fraud statute, like the mail fraud statute, uses the term "to defraud" to refer to "wronging one in his property rights by dishonest methods or schemes" and "usually signif[ies] the deprivation of something of value by trick, deceit, chicane, or overreaching". *McNally v United States*, 483 U.S. 350, 358, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987) quoting *Hammerschmidt v United States*, 265 U.S. 182, 188;

44 S. Ct. 511, 69 L. Ed. 968 (1924).[1] A scheme to deceive, no matter how dishonest its means is not a scheme to defraud in violation of the wire fraud statute in absence of a property right for the scheme to compromise. *Carpenter v United States*, 484 U.S. 19, 27-28, 108 S. Ct. 316; 98 L. Ed. 2d 275 (1987).

This Court has held that the mail fraud statute protects property rights and not intangible rights. *McNally v United States*, *supra*. In *McNally*, this Court rejected the government's theory of prosecution that the defendant's participation in a self-dealing patronage scheme defrauded citizens of their "intangible rights" of good government and concluded that the statute "clearly protects property rights, but does not refer to the intangible right of citizens to good government." 483 US at 356; 107 S Ct at 2879. In the same year, in *Carpenter v United States*, 484 U.S. 19, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987) this Court explained that the scope of protection afforded by the mail fraud and wire fraud statutes includes intangible property rights, there particularly, the right to exclusive use of confidential business information.

In *Carpenter v United States*, *supra*, this Court held that confidential pre-publication information of the Wall Street journal regarding the contents of its "Heard on the Street" column, misappropriated by the defendants, was property sufficient to establish a violation of the mail and wire fraud statutes. According to *Carpenter*, "confidential business

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[1] Analysis of the elements of the mail fraud statute and the wire fraud statute is much the same. They each prohibit a scheme or artifice to defraud or to obtain money or property. Only the jurisdictional elements, use of the mails or use of wire communications, differ. *Neder v United States*, 527 U.S. 1, 20, 119 S. Ct. 1827, 144 L. Ed. 2d 2035 (1999).

information has long been recognized as property". *Id.* at 26. It is "a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy". *Id.* at 26, citing 3 W. Fletcher Cyclopedia of Law of Private Corporations, § 857.1, p. 260 (Rev. Ed., 1968). In addition, the intangible property interests in *Carpenter* were defined by the economic value in the ownership of "news matter", the right to keep the information confidential, and the right to enjoy its exclusive use. *Id.* at 26.

In *Cleveland v United States*, 531 U.S. 12, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000), decided after the trial of this case but prior to the District Court's decision on the defendants post-trial motion for acquittal, this Court further defined the scope of the mail and wire fraud statutes to require proof of a property loss by a victim. In *Cleveland,* this Court rejected a prosecution for violation of the mail fraud statute based upon the theory that an unissued license was property of the government agency responsible for its issuance and that a scheme to obtain a license by means of false representations was subject to prosecution under the mail fraud statute. A government agency's right to regulation and control, according to *Cleveland*, does not define a property interest sufficient to be the object of a mail fraud offense.

In addition, this Court held that it is not sufficient that the perpetrator of a scheme obtain something of value unless the victim suffers a related loss. "It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." 531 U.S. at 15, 121 S. Ct. at 368.

In *United States v Walters*, 997 F.2d 1219 (7th Cir, 1993), the court reached a similar conclusion and reversed a mail fraud conviction of a sports agent for cheating universities by signing student athletes to representation agreements and offering incentives which would affect the athletes' eligibilities. The government argued in *Walters* that the university lost its scholarship money and that "neither an actual nor a potential transfer of property from the victim to the defendant is essential". *Id.* at 1224. The court disagreed. The scheme was not one that contemplated Walters obtaining anything from the university nor anything from the athletes until after their college graduations. The court held "that only a scheme to obtain money or other property from the victim by fraud violates § 1341. A deprivation is a necessary but not a sufficient condition of mail fraud. Losses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement." *Id.* at 1227.

In *Cleveland*, this court also explained that analysis of the property element of the mail fraud statute is guided by the rule of lenity which instructs that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v United States*, 401 U.S. 808, 812; 91 S. Ct. 1056; 28 L. Ed. 2d 493 (1971). This rule "is especially appropriate in construing § 1341 because, as this case demonstrates, mail fraud is a predicate offense under RICO, 18 USC § 1961(1), (1994 Ed., Supp. IV), and the money laundering statute, § 1956(c)(7)(A). This Court, therefore, opined that in deciding what is "property" under § 1341, we think "it is appropriate, before we choose the harsher alternative to require that Congress should have spoken in language that is clear and definite." 531 U.S. at 25, citing *United States v Universal CIT Credit Corp.*, 344 U.S. 218, 222, 73 S. Ct. 227; 97 L. Ed. 260 (1952).

The admonition of *Cleveland*, that a victim suffer a loss of property as a result of a fraud scheme, must apply where the property which is the object of a scheme to defraud is an intangible security interest in personal property. Although the sole issue raised on appeal by the Government in this case is whether the scheme to defraud NFO deprived it of if its security interest, the analysis by the court below does not discuss whether NFO lost its security interest as a result of the inventory sale in January, 1996. The Opinion of the Court below is only concerned with whether the security interest is property. The issue, whether NFO was deprived of its security interest, however, was not framed in the trial court because the Government's trial theory was that NFO lost money – not an intangible security interest – as a result of the cheese sale.

In the present case, the NFO security interest was a "bundle of rights" ... smaller than that which accrues to an owner in fee simple ... " *United States v Security Industrial Bank*, 459 U.S. 70, 76, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982). NFO's security interest in personal property was limited by its waiver of all its interest in proceeds and by its subordination of its interest to prior creditors. The security interest was mainly useful "as a convenient tool with which to threaten the debtor to reaffirm the underlying obligation". *Id.* at 84, Blackmun, J., concurring. The NFO security interest was an intangible interest without a discernible value established in the trial record. For example, NFO sued to foreclose its security interest in the cheese, but the Government successfully objected at trial to evidence concerning that litigation and evidence of a lawsuit and claim by another creditor of a security interest in the same cheese inventory.

At best, the trial evidence established that NFO's security interest in cheese, without any right to proceeds, was a "right of control". Decisions of the Courts of Appeals are split on the question whether the mail and wire fraud statutes protect "the right of control" over a property interest. Whether some form of interference with intangible property or the "right to control" intangible property is sufficient to establish that the object of a wire fraud scheme is to obtain property, is an issue that should be resolved by this Court.

In *Ward v United States*, 945 F.2d 1459 (7th Cir. 1988), the Court affirmed the grant of a motion to vacate a bribery conviction obtained pursuant to the mail fraud statute on an intangible rights theory prior to this Court's decision in *McNally v United States*, *supra*. The government argued in support of the conviction that the bribery resulted in a state court losing property, money posted as a bail bond, which served not only to provide assurance of a defendant's appearance but to provide security for payment of costs and fines. Relying upon *United States v Security Industrial Bank*, *supra*, the court observed that a security interest is a property right, but rejected that as a basis for decision because it was not a theory argued in the district court. *Messinger v United States*, 872 F.2d 217 (7th Cir. 1989) (premature termination of a prosecution as the result of a scheme to bribe a circuit court judge caused the refund of a cash bail bond). However, in *United States v Howard*, 30 F.3d 871 (7th Cir. 1994), the court held that a perfected security interest in proceeds of an insurance check was not a thing of value for purposes of the federal theft of government property statute, 18 USC § 641. The court in *Howard* relied upon *United States v Tanna,* 618 F. Supp. 1393 (S.D.N.Y. 1985), holding that 18 USC § 641 does not protect property in which the federal government merely has a general security interest.

It has also been held that deprivation of other intangible interests such as a "chose in action" does not constitute a loss of money or property under the wire fraud statute. *United States v Miller*, 397 F.2d 1010 (2nd Cir. 1993); *United States v Adler*, 186 F.3d 574 (4th Cir. 1999). In *Miller*, profits resulting from the resale of apartments, state law rights to profits obtained by attorneys in the course of their representation of clients and the wrongful use of down payments were held not to constitute property interests for purposes of a mail fraud prosecution. In *Adler*, the court held that although a chose in action is property, the victim was not deprived of that right and, in fact, excercised its right to sue. Money placed beyond the reach of a creditor did not deprive the creditor of that in which he had a property right. Citing *United States v Carmen*, 577 F.2d 556, 564-65 (9th Cir. 1978), the court in *Adler* stated: "[M]oney placed out of the reach of creditors is not the equivalent of money stolen, converted, or taken by fraud 'within the meaning of' 18 USC § 2314, because creditors are not the owners of the money." 186 F.3d at 580.

Other circuits have split on the issue of whether the mere loss of a right to control property is sufficient to establish the property element of mail fraud. In *United States v Shyers*, 898 F.2d 647, 652 (8th Cir. 1990), the court held that the right to control spending "constitutes a property right". However, in *United States v Wallach*, 935 F.2d 445, 462 (2nd Cir. 1991), the court explained "that it is not really the right to control spending, but the deprivation of "some potentially valuable economic information" which is the real import of the use of the terminology "right to control spending". A similar position was articulated in *United States v Kerkman*, 866 F.2d 877, 880 (6th Cir. 1989). However, in *United States v Mittelstaedt*, 31 F.3d 1208 (2nd Cir. 1994), the court

rejected the "right to control" theory where it was based upon underlying standards for disclosure of information.

In light of this Court's holding in *Cleveland v United States, supra*, that the mail and wire fraud statutes require proof of a loss of property by a victim, the nature of the deprivation of intangible property sufficient to satisfy the property element of the wire fraud statute is unclear. This Court should grant certiorari in this case to resolve this issue.

B. THE QUESTION IS IMPORTANT

The wire and mail fraud statutes have been broadly used when federal prosecutors have decided conduct is objectionable but not easily charged under other statutes. John C. Coffee & Charles V. Whitehead, The Federalization of Fraud: Mail and Wire Fraud Statutes, WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES, § 9.01, at 9-2 (O. Obermaier & R. Morvillo eds., 1990). Because both the mail and wire fraud statutes are predicates to implementation of enhanced criminal penalties pursuant to the RICO and money laundering statutes, this Court has cautioned that the rule of lenity should guide analysis of the mail and wire fraud statute property elements. *Cleveland v United States, supra*. The admonition is particularly apt here. In this case, the Indictment alleges that it was the proceeds of wire fraud which were involved in financial transactions in violation of the money laundering statutes. Finally, because definitions of security interests and other intangible property interests vary from state to state, the definitions of federal criminal offenses charged pursuant to the wire and mail fraud statutes are subject to the fortuities of where the means of communication providing venue for a criminal charge places the locus of a fraud offense. *United States v Turley*, 352 U.S. 407, 411, 77 S. Ct. 397, 1 L. Ed.

2d 430 (1957); *United States v Shotts*, 145 F.3d 1289, 1294 (11th Cir. 1998). Therefore, this Court's guidance is necessary to define the scope of the wire fraud statute.

II. THE GOVERNMENT'S CHANGE IN ITS THEORY OF PROSECUTION ON APPEAL IN ORDER TO ARGUE THAT THE PROPERTY ELEMENT OF WIRE FRAUD, 18 USC § 1343, HAD BEEN ESTABLISHED AT TRIAL, VIOLATED THIS COURT'S RULE IN *STEAGALD V. UNITED STATES*, 451 U.S. 204, 101 S. CT. 1642, 68 L. ED. 2D 38 (1991), THAT THE GOVERNMENT LOSES ITS RIGHT TO MAKE FACTUAL ASSERTIONS ON APPEAL WHEN IT HAS MADE CONTRARY ASSERTIONS IN THE LOWER COURT.

Prior to trial, Petitioners filed a motion to dismiss the Indictment arguing that the wire fraud charges in Counts 2-7 were legally insufficient because they did not allege a scheme intended to deprive NFO of its money or property. The Government's response argued that money was the object of the scheme and described the object of the fraud as proceeds derived from the sale of the cheese. It was the government's mantra in the District Court that no one would dispute that money is property, that money was the object of the scheme, and that the money was money laundering "proceeds".

Because Defendants argued in pretrial motions that the NFO security interest as well as money from the cheese sale was not property lost by NFO, three days before trial the Government filed a preemptive motion asking the court to preclude any reference by the Petitioner to the UCC, other commercial law principles, or to civil litigation between the cheese plant, the dairy and its other creditors. The motion

argued that the status of the Collateral Pledge and Security Agreement, the UCC and other civil law principles relating to secured transactions were irrelevant, misleading and should be excluded pursuant to FRE 401 and 403. The motion was granted.

At trial, the government repeatedly and successfully objected to evidence relating to civil litigation brought by the plant's other secured creditors, and by NFO, on grounds of relevance. Petitioner attempted to establish by that evidence that the NFO Trust's security interest was not property lost by the NFO Trust.

In the prosecution's opening statement and its closing argument, it emphasized that the government's case was about what the defendants did with other people's money. The prosecutor told the jury in his opening that the evidence would prove a scheme to deny, and to keep the money away from NFO; money that had been generated by the sale of cheese.

At trial, the Government's theory was that the property which was the object of the wire fraud scheme and the proceeds which were the object of the money laundering conspiracy and substantive money laundering offenses charged in the Indictment, were both the same; they were the money obtained by the Defendants from the sale of RPC's cheese inventory to Nor-tech Dairy Advisors, then to Christopher Grisel's company, InnoQuest, and finally to ultimate purchasers generating money which was used to pay creditors, except NFO. The Defendants argued in the District Court that neither the cheese inventory nor the money obtained from the sale of the cheese inventory was property of NFO.

The Government switched theories on appeal in response to the District Court's analysis that the NFO security interest did not satisfy the wire fraud statute elements, to argue that RPC was a separate, discrete entity for purposes of its appeal analysis that the security interest granted by RPC to NFO was property unencumbered by security interests of prior creditors in other entities. The Government argued that because RPC was a separate entity, the security interests granted by prior businesses which operated the plant were irrelevant.

The Government's trial theory of common ownership and control was first articulated in the Indictment. The Government's opening statement described its theory of fraud as four chapters in a book concerning the operation of the Pinconning cheese plant. The prosecutor's opening focused upon Petitioners ownership and control of the cheese plant and not on particular or separate entities. The Government's closing argument repeated the Government's four chapters theory and argued that the defendants were in exclusive control of the plant from the time they arrived in late 1994 until the end. According to the Government, the other entities associated with the plant were nothing more than name changes by the defendants to create confusion.

Based upon the Government's theory that the cheese plant was a single entity and based upon the trial court's instruction to the jury that "any other creditor like Earthsafe ... who filed its mortgage first is entitled to take the receivables and cheese inventory and apply that property to its debt until the debt is paid in full", *supra* at JA 2872, the District Court concluded that no rational trier of fact could find that NFO's security interest had value.

In granting the Defendant's post-trial judgment of acquittal, the District Court rejected the Government's theory

that money from the sale of the cheese inventory satisfied the property element of wire fraud and held, based upon the facts presented at trial, that no rational jury could have concluded that NFO's security interest was property; and, therefore, that there was no loss of property from which the jury could find the elements of wire fraud. On appeal, however, the Government made no argument that the District Court erred by rejecting the Government's money is property theory and instead argued only that the trial court was wrong in its conclusion that NFO's security interest satisfied the property element of the wire fraud offenses. The Government's argument on appeal that the NFO security interest alone satisfied the burden of proof was a substantial change in theory.

The decision of the Court of Appeals reversing the District Court's post-trial decision to dismiss all remaining counts, based on a change in the Government's theory on appeal, is fundamentally unfair. In the District Court, the Government successfully sought to prevent the Defendants from contesting the value of NFO's security interest. In the District Court the Government argued that the various entities which operated the cheese plant from 1994 to 1996 were owned or dominated by the Defendants and were in reality one. In the District Court, the Government argued the object of the wire fraud and the proceeds for the money laundering offenses were money. In the Court of Appeals, the Government argued the object of the wire fraud was an intangible security interest valued only by interests of RPC creditors.

The Government's change in legal theory on appeal to one it successfully opposed in the District Court denied Petitioner the opportunity to introduce evidence, to fully cross-examine witnesses, and to fully frame the issue in the trial court which the Government championed in the Circuit Court, whether the

fraud scheme which resulted in the sale of the plant cheese inventory subject to a security interest, caused a loss to the NFO Trust of its security interest. *Steagald v United States*, 451 U.S. 204, 209; 101 S. Ct. 1642; 68 L. Ed. 2d 38 (1981).

In *Steagald v United States*, 451 U.S. at 209, this Court held that :

> The Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.

In *Steagald*, the defendant was convicted of drug offenses. Before trial, he moved to suppress evidence arguing that agents failed to obtain search warrants before entering a house where the drugs were found. The district court agreed with the government's argument that the seizure was sufficient because it was made while executing an arrest warrant. Before this Court, the government attempted to raise a new legal argument, that the petitioner lacked "an expectation of privacy in the house sufficient to prevail on his Fourth Amendment claim." *Id.* at 451 U.S. at 208. The Government acknowledged, however, that the record did not sufficiently support this position and urged a remand for re-examination of the fact question presented by its new position. The change in theory was deemed a sufficient reason to reject the Government's argument. This Court concluded in *Steagald* "that the Government, through its assertions, concessions, and acquiescences has lost its right to challenge Petitioner's assertion that he possessed a legitimate expectation of privacy in the searched home." 451 U.S. at 211.

In *Hormel v Helvering*, 312 U.S. 552, 556, 61 S. Ct. 719, 85 L. Ed. 1037 (1941), this Court held that an appellate court does not ordinarily give consideration to issues not raised in the district court because "our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all of the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." Similarly, in *Giordenello v United States*, 357 U.S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958), this Court rejected the government's attempt to defend the arrest of a defendant on a theory that his arrest was permitted without a warrant pursuant to state law, while in the district court it relied upon the validity of a warrant. This Court rejected the government's attempt to change theories because the petitioner had no opportunity to cross-examine witnesses or "introduce evidence of his own to rebut the contentions the government makes here for the first time". 357 U.S. at 488. This Court also has rejected attempts to rely upon legal theories not presented to the jury. *Rewis v United States*, 401 U.S. 808, 91 S. Ct. 1056, 28 L. Ed. 2d 493 (1971); *Chirarella v United States*, 445 U.S. 222, 236, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980) (" ... we cannot affirm a criminal conviction on the basis of a theory not presented to the jury...").

In this case, the Circuit Court reversed the District Court's grant of a judgment of acquittal based upon an argument and legal theory not pursued by the Government at trial. At trial, the Government vigorously objected to the Petitioners' attempts to present evidence and argument concerning the scope and nature of NFO's security interest in

the RPC cheese inventory because, it argued, NFO's loss was money. Whether the NFO security interest was "property" was a matter of law, but the mixed question of law and fact, whether NFO was deprived of its security interest as a result of the scheme to defraud, was not framed in the trial court

If this Court determines not to grant plenary review, it should grant certiorari, vacate the decision below, and remand to the Circuit Court for reconsideration in light of *Steagald*.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 01-2534, 01-2536

[Filed January 9, 2004]

UNITED STATES OF AMERICA, Plaintiff-Appellant,	)
v.	)
ALAN MIKELL, Defendant-Appellee.	)

BEFORE: KEITH, COLE, AND COOK, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant.

It is **ORDERED** that the position for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case Nos. 01-2534, 01-2535, 01-2536, 01-2537

[Filed December 1, 2003]

UNITED STATES OF AMERICA, Plaintiff-Appellant, Cross-Appellee,	)
v.	)
ALAN MIKELL; CHRISTOPHER GRISEL, Defendants-Appellees, Cross-Appellants.	)

JUDGES: BEFORE: KEITH, COLE and COOK, Circuit Judges.

OPINION

DEBORAH COOK, Circuit Judge. Plaintiff-Appellant, the United States of America, appeals the district court's grant of defendants' motions to acquit after a jury verdict finding them guilty of conspiracy to launder money and wire fraud. The district court granted the defendants' post-trial motions for acquittal for improper venue on several counts and for insufficient evidence on the remaining counts. The United States appeals only the judgment of acquittal for insufficient evidence. Alan Mikell and Christopher Grisel cross-appeal the

district court's ruling that their motions for mistrial were rendered moot by the judgment of acquittal. We **REVERSE** the district court's judgment of acquittal on those counts appealed, reinstate the jury's verdicts, and remand to the district court for consideration of defendants' mistrial motions.

I. BACKGROUND

The offending conduct at stake in this appeal concerns Mikell and Grisel's self-dealing (using mail, fax and telephone) that defrauded secured creditor NFO by diverting most of the value of certain inventory from NFO during the closing days of defendants' cheese-manufacturing business. The series of separate corporations controlled by Mikell and Grisel and the debtor-creditor relationships among these entities and their creditors dictates the outcome of this appeal.

Kraft Company owned a cheese-making plant in Pinconning, Michigan. In 1993, a corporation controlled by Arthur Dore, Pinconning Cheese Co, purchased the plant and equipment from Kraft Company and operated it as Dore's Pinconning Cheese, Inc. (DPC). DPC borrowed $1.5 million from another Dore-controlled entity, Dore & Associates. Dore and Associates secured repayment of this debt by taking a security interest in DPC's assets, including its cheese inventory.

Mikell and Grisel's involvement with the cheese plant began in 1994 as creditors. DPC borrowed $1 million from EarthSafe, a new corporation formed by corporations owned by Mikell and Grisel. EarthSafe too took a security interest in DPC's cheese inventory and other assets to secure its loan. Later that year, EarthSafe purchased DPC from Dore, including the $1.5 million secured debt owed by DPC to Dore

and Associates. EarthSafe began operating the cheese plant as Paul's Pinconning Cheese (PPC).

In March, 1995, the Michigan Department of Agriculture suspended PPC's license and shut down the plant because PPC owed its major milk supplier about $1,000,000. That supplier--National Farmer's Organization (NFO)--was a trust that operated on behalf of its collective member-farmers to market their milk and to collect and disburse money owed to them. In order to resume production, EarthSafe itself obtained a license and then reopened the plant under the EarthSafe name, leasing its equipment and facilities from PPC.

A few months later, Mikell and EarthSafe formed Real Pinconning Cheese, L.C. (RPC) as a new limited liability corporation under Michigan law. RPC began operating the plant in June 1995. It leased the facility and equipment from PPC, obtained its own dairy license, purchased milk, and produced and sold cheese.

Following the earlier financial problems that caused the plant shut down, NFO sold to any business operating that plant on a cash basis only. RPC, however, proposed a credit payment method that induced NFO to extend credit. RPC arranged for Concord Growth Corporation (Concord) to function as a factor, depositing all RPC's accounts receivable in an account controlled exclusively by Concord and inaccessible to RPC. The factoring arrangement allowed Concord to control this account with the understanding that RPC would receive payment only after NFO's invoices were paid. Several agreements implemented this payment arrangement. First, RPC and Concord signed a factoring agreement that secured payment of the factor fees with a security interest in RPC's assets and inventory. Second, RPC and NFO executed a collateral pledge and security agreement

by which RPC gave NFO a first lien and security interest in RPC's cheese inventory. Last, Concord agreed with NFO to subordinate a substantial amount of its (Concord's) interest in the cheese inventory to NFO's interest. In October 1995, the parties filed a UCC-1 statement identifying NFO's lien on RPC's cheese inventory.

Despite the factoring of RPC's receivables, by January 1996 RPC owed NFO over $1 million. This debt was not the same debt that *PPC* owed to NFO. NFO notified RPC that it was holding RPC in default and exercising control over the collateral--approximately 770,000 pounds of cheese. A number of events took place at this time. Unknown to NFO, Mikell and Grisel contracted to sell the cheese inventory to Nor-Tech Dairy Advisors for $0.25 per pound, well below the market price of about $1.40 per pound. This agreement required Nor-Tech to immediately resell the cheese to InnoQuest, an entity owned by Grisel, for $0.30 per pound, allowing Nor-Tech to make $0.05 per pound on the transaction and allowing Grisel, through InnoQuest, to acquire the cheese inventory at a price well below market value for eventual resale at market prices.

Without knowing about the secret resale scheme being orchestrated by the defendants, NFO obtained a state court order enjoining the removal of the cheese inventory from RPC's plant to enforce its security interest in the inventory. Faced with this barrier to their scheme, Mikell and Grisel represented to NFO that the cheese inventory was to be sold at market price and the sales proceeds would be paid directly to Concord and in turn, to NFO. This persuaded NFO to lift the injunction.

Defendants withheld the details of its below market sales to Nor-Tech and resale to InnoQuest. The proceeds of the

eventual resale of the cheese at market prices enabled the defendants to divert over $1.00 per pound, more than $700,000, from NFO. Most of that amount was paid to a special InnoQuest account under Grisel's control and was used to benefit Mikell and Grisel. Despite the agreement that all RPC accounts receivable go to Concord, the only money paid to the Concord account was the proceeds of the initial sale to Nor-Tech for $0.25 per pound; not the $1.36 and $1.40 per pound that InnoQuest received from two ultimate buyers. As part of the plan to cover up these resales, Grisel directed the two buyers to whom InnoQuest resold cheese to make the majority of their payments to Nor-Tech. It in turn forwarded the money to InnoQuest. InnoQuest (controlled by Grisel) disbursed the money to, among others, Mikell.

The United States charged Mikell and Grisel with conspiracy, mail fraud, and wire fraud, among other crimes, in a fifty-two-count indictment. The jury found them guilty on a number of counts. But after verdict, the district court granted Defendants' motions for acquittal under Rule 29 of the Federal Rules of Criminal Procedure. The court decided that the United States failed to prove that the object of the scheme was money or property with value and, without having proved the underlying offenses, the conspiracy counts could not stand either and failure to prove venue prompted dismissal of all the other counts. The United States appealed only the counts dismissed for insufficiency of the evidence. Defendants cross-appealed, arguing that the district court erred by failing to rule on their remaining post-trial motions--motions the district court determined to be moot in light of its grant of the motions for acquittal.

II. ANALYSIS

A. Standard of review

Rule 29(c) of the Federal Rules of Criminal Procedure allows the district court to set aside a jury verdict and enter judgment of acquittal when, "after viewing the evidence in the light most favorable to the United States," the trial court finds that no rational trier of fact "could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In reviewing a district court's order of acquittal, we apply the same standard to the record before us, assuming the truth of the evidence offered by the government. *United States v. Connery*, 867 F.2d 929, 930 (6th Cir. 1989). The granting of a motion for acquittal should be confined to those cases where the government's failure is clear. *Id.*

B. Elements of the offenses

In order to convict defendants, the United States needed to prove that Mikell and Grisel, having devised a scheme to defraud for obtaining money or property by means of false or fraudulent pretenses, transmitted by wire, radio, or television, in interstate commerce, any writings or sounds for the purpose of executing the scheme. 18 U.S.C. § 1343. And for the conspiracy count, the United States needed to prove that defendants *conspired* to commit criminal offenses of the type set forth in the indictment. 18 U.S.C. § 1956(h). The only issue on appeal is whether the United States proved beyond a reasonable doubt that the object of the scheme was money or property.

C. Sufficient evidence

Considering the evidence in the light most favorable to the United States, we find that a rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. The district court erred by granting the motions for acquittal.

In reaching its decision to acquit, the district court took the view that all of the defendants' entities debts encumbered the RPC inventory. That view reflects the court's mistaken analysis that, because the government premised its theory of criminal responsibility on Mikell and Grisel's consistent dominance of the various corporate entities as one continuous enterprise, the entities likewise merged for purposes of analyzing NFO's commercial interests in the inventory. Proceeding from that premise, the trial court viewed the inventory as valueless to NFO because, as it reasoned, Mikell and Grisel's cheese business owed Dore & Associates and EarthSafe millions of dollars in prior liens--more than the value of the inventory. Thus, the court concluded, NFO would have realized no value from the inventory and therefore it was deprived of nothing. Because obtaining money or property must be the object of a scheme to defraud under 18 U.S.C. § 1343, the court found that proving the scheme to defraud NFO did not suffice to prove the "money or property" element of a § 1343 offense.

But neither Dore and Associates nor EarthSafe had a security interest in the cheese inventory of RPC. Dore took a security interest in Pinconning Cheese, Inc. and EarthSafe in PPC. Mikell and Grisel structured the various entities so that only NFO's Collateral Pledge and Security Agreement encumbered RPC's inventory (Concord's interest in the

inventory was subordinated to NFO's interest); the agreement specified NFO's as the first lien.

Moreover, RPC was a new, separate corporation leasing the plant and equipment from PPC but with no obligation to PPC's creditors, including EarthSafe. RPC did not even exist when Dore and EarthSafe obtained their security interests in the inventory of corporations that owned the cheese plant earlier, PPC and DPC. The district court itself confirmed in its jury instructions that "Dore has a security interest in Pinconning Cheese, Inc., and Earthsafe has a security interest in Dore's Pinconning Cheese, Inc."

Unquestionably, defendants recognized NFO's commercial right to the cheese inventory as superior to Dore and EarthSafe because RPC paid NFO (through Concord) the entire proceeds of initial, duplicitous, below-market sale. Both Mikell and Grisel testified that *NFO* controlled the inventory after default. (Mikell--JA at 1609--10; Grisel--JA at 1647--48). Had RPC sold the inventory at market prices, NFO would have realized some $700,000 more through the Concord factoring arrangement. Instead, defendants' contrived chain of resales diverted the majority of the sale proceeds to Defendants' benefit. A reasonable trier of fact could have found the essential "money or property" element on this aspect of the evidence alone.

Viewing the evidence in the light most favorable to the government, we find that a rational trier of fact could have found that defendants suffered a loss that suffices to prove the "money or property with value" element of the offense. *United States v. Dandy*, 998 F.2d 1344, 1358 (6th Cir. 1993). The district court erred therefore in granting the motions for acquittal on those counts appealed.

D. Pending motions

Having determined that the district court erred by granting the motions for acquittal, we also agree with the defendants' argument and the United States' concession that the cause should be remanded. When the district court vacated the convictions, it ruled that the judgment dismissing the case rendered the pending motions for mistrial moot. Federal Rule of Criminal Procedure 29(d)(1) requires district courts entering a judgment of acquittal after a guilty verdict to decide whether a motion for a new trial should be granted if the judgment of acquittal is later reversed. Defendants' two unconsidered motions ask the district court to order a new trial due to irregularities in the trial proceedings. The court erred in failing to rule on these two motions.

III. CONCLUSION

The district court erred in granting the motions for acquittal. We **REVERSE** the district court's judgment of acquittal, reinstate the convictions on the counts appealed and remand the case to the district court to consider the motions for mistrial that were pending at the time of the judgment of acquittal.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Case No. 97-CR-81493

[Filed September 24, 2001]

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.)
)
D-1 ALAN MIKELL,)
D-2 CHRISTOPHER GRISEL,)
Defendants.)
)

JUDGE: ROBERT H. CLELAND, UNITED STATES DISTRICT JUDGE.

OPINION

ORDER GRANTING DEFENDANTS' VENUE MOTIONS; GRANTING DEFENDANTS' MATERIALITY MOTIONS; DENYING AS MOOT DEFENDANTS' MOTION FOR MISTRIAL; DENYING AS MOOT DEFENDANT GRISEL'S MOTION TO REPLACE COUNSEL; DENYING AS MOOT DAVID HERRINGTON'S MOTION TO WITHDRAW AS COUNSEL; AND DENYING AS MOOT PLAINTIFF'S MOTION SEEKING RESOLUTION OF RULE 29 MOTIONS AND OTHER MATTERS

Pending before the court are the following motions by Defendants Alan Mikell and Christopher Grisel:[1] (1) "Motion for Judgment of Acquittal or in the Alternative for Arrest of Judgment (Venue)" ("Venue Motions"), filed on June 29 and July 20, 1999 respectively; (2) "Motion for Judgment of Acquittal Pursuant to Rule 29(c) FRCrP and for Arrest of Judgment Pursuant to Rule 34 FRCrP" ("Materiality Motions"), filed on June 29, 1999 and July 20, 1999 respectively; and (3) "Motion for Mistrial for Denial of Right of Counsel and for Mistrial (Green & Purtell), filed on April 26, 1999. Also pending before the court are (1) Grisel's "Motion to Replace Counsel," filed on November 17, 1999, (2) David Herrington's[2] "Motion to Withdraw as Counsel," filed on November 17, 1999, and (3) Plaintiff United States of America's ("Government's") "Motion Seeking Resolution of Rule 29 Motions and Other Pending Matters," filed on August 6, 2001. For the reasons set forth, the court will grant

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[1] Defendants filed virtually identical motions for each request for relief.

[2] David Herrington is representing Grisel in this action.

Defendants' Venue and Materiality Motions, while denying the remaining motions as moot.

I. BACKGROUND

During all relevant times, Defendants owned Real Pinconning Cheese ("RPC") in Pinconning, Michigan.[3,4] On September 26, 1995, RPC entered into an agreement to purchase milk from National Farmers Organization Dairy Custodial Account ("NFO"). Because RPC already owed NFO approximately $1,000,000 for previously shipped milk, NFO only agreed to ship additional milk under certain conditions: namely, a collateral pledge and security agreement whereby RPC could be held in default for failure to remain current on milk payments and whereby NFO could obtain a security interest in RPC's cheese inventory.

By January 1996, RPC owed NFO approximately $2,400,000 (including the previous $1,000,000 debt) for unpaid milk invoices. NFO then notified Defendants that it was holding RPC in default and exercising control of the collateral, that is, approximately 771,338 pounds of cheese which was then warehoused at, and/or in transit to, Pinconning.

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[3] Prior to mid-May 1995, the cheese company was called, among other things, "Pinconning Cheese, Inc.," "Dore's Pinconning Cheese, Inc.," "Paul's Pinconning Cheese," and "Earthsafe Enterprises, Inc."

[4] RPC was owned by Earthsafe Enterprises, Inc., an Oklahoma corporation, which in turn was jointly owned by Innoquest, Inc., a Texas corporation, of which Grisel was president, and Mikco, Inc., an Oklahoma corporation, of which Mikell was president.

After receiving formal notification that they were being held in default, Defendants devised a scheme whereby they could avoid their obligations to NFO without themselves suffering financially. First, Defendants sold the cheese to Nor-Tech Dairy Advisors, Inc. ("Nor-Tech"), which was owned by Ronald Hines.[5] Although the Pinconning cheese was almost entirely grade "A," and thus at the time worth approximately $1.35 to $1.40 per pound, Defendant sold the cheese to Nor-Tech at $0.25 per pound. A companion agreement required Hines to quickly resell the cheese back to Grisel's company Innoquest for $0.30 per pound plus shipping costs. Grisel, through Innoquest, then resold the cheese to a company called Sorrento at $1.40 per pound and a second entity named E.J. Marketing for an average of $1.36 per pound. RPC was only required to pay NFO the money from the initial sale of cheese to Nor-Tech, which was priced at $0.25 per pound and not at the market value then prevailing.

In an effort to conceal the transaction between Hines and Innoquest, Grisel directed Sorrento and E.J. Marketing to send the majority of payments for the cheese to Nor-Tech, rather than to Innoquest directly. Hines then forwarded this money to Innoquest, who disbursed some of the money to Mikell and others.

As a result of the above stated actions, a grand jury charged Defendants in a fifty-two count Second Superceding Indictment with, among other things, mail fraud, wire fraud, and money laundering. After a lengthy trial, the jury returned a guilty verdict against Defendants on numerous counts. The instant motions followed.

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[5] Nor-Tech is located in Sioux Falls, South Dakota.

II. CHRISTOPHER GRISEL

Three days after the jury's May 25, 1999 verdict, Grisel filed a motion for extension of time until June 30, 1999 to file motions pursuant to Federal Rules of Criminal Procedure 29(c) and 34. The court granted the motion on June 4, 1999. Grisel then filed a supplemental motion to extend time until July 16, 1999 to file his post-verdict motions. The court granted this motion on July 22, 1999, two days after Grisel filed his post-verdict motions.

Federal Rule of Criminal Procedure 29(c) provides that "if the jury returns a verdict of guilty . . . , a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Rule 34 mandates an identical time frame for filing of motions.[6] Rule 45(b) provides in turn that "the court may not extend the time for taking any action under Rule 29, 33, 34 and 35, except to the extent and under the conditions stated in them."

On June 4, 1999, within seven days after the jury verdict,[7] the court granted Grisel's first motion for extension and

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[6] Rule 34 provides, in pertinent part, that "the motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty . . . or within such further time as the court may fix during the 7-day period."

[7] Since the period allowed to file Rule 29 and 34 motions is less than eleven days, intermediate Saturdays, Sundays, and legal holidays are excluded from the computation. Fed. R. Crim. P. 45(a). Thus, excluding the intermediate weekend and Memorial Day, the court granted Grisel's motion for extension of time within the requisite seven day period.

directed him to file his post-verdict motions on or before June 30, 1999. Even though the court also permitted a second extension of time to file Rule 29 and 33 motions, the second motion was untimely because "Rules 29 and 33 do not allow successive extensions of time; Rule 45(b) expressly forbids them." *United States v. Hocking*, 841 F.2d 735, 737 (7th Cir. 1988); *see Carlisle v. United States*, 517 U.S. 416, 420-22, 116 S. Ct. 1460, 134 L. Ed. 2d 613 (1996) (holding that plain and unambiguous language of Rule 29 does not permit the granting of an untimely post-verdict motion for judgment of acquittal). Thus, in hindsight, the court should not have granted Grisel's second extension motion because it lacked the authority to do so.

Some courts have held, however, that untimely motions can be acted upon when the district court induced parties to rely to their detriment on erroneous extensions of time. *See Hocking*, 841 F.2d at 737. Nevertheless, this court did not induce Grisel to rely upon the erroneous extension of time to his detriment. As stated by the Court of Appeals for the Seventh Circuit ("Seventh Circuit") in a virtually identical set of circumstances, "any error was generated by the [defense lawyer]; the district court simply granted a motion."[8] *Id.*

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[8] In *Hocking*, the district court timely granted the defendant's first request for an extension of time to file motions pursuant to Rule 29(c) and 33. Thereafter, the defendant asked for a second extension, which was granted by the district court. The defendant filed his motions on December 28, about 2 months after the jury verdict but within the time period established by the order granting the defendant's second extension motion. The Seventh Circuit held that these motions are not timely because (1) December 28 was not a time fixed within seven days of the jury verdict and (2) thus the defendant "had no right to ask, and the district court lacked authority to grant, a second extension." 841 F.2d at 737.

Hence, the mere granting of an unopposed motion for extension of time does not rise to the level of inducement.

Even though the court lacks jurisdiction to resolve Grisel's post-verdict motions, the substance of his arguments were contained within motions that either was reserved by the court during the trial or are still pending without reservation. Insofar as pre-verdict motions are still pending, the court has the authority to resolve those issues raised in them. With respect to motions in which a ruling has been reserved, the court is limited to the evidence presented up to the time of the reservation. Fed. R. Crim. P. 29(b). For the unreserved, pending motions, the court is not restricted by limited evidence.[9]

III. VENUE MOTIONS[10]

Mikell asks the court to arrest judgment or to grant a judgment of acquittal as to Counts 8, 25, and 27 because the Government has failed to prove by a preponderance of evidence that venue is proper in this district. Similarly, Grisel asks the court to arrest judgment or to grant a judgment of acquittal as to Counts 9-11, 13-20, 22-24, and 29 based on the

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[9] The conclusion in this section only pertains to Grisel because Mikell filed his post-verdict motions prior to the expiration of the time period fixed by the court within seven days after the jury verdict.

[10] The court notes that even if venue is proper for the contested counts, Defendants' convictions for these counts must still be vacated for the reasons stated in Section IV of this order.

same venue argument.[11] The Government opposes these requests, arguing that venue is proper in this district because Defendants had the following ties with the Eastern District of Michigan:

1) The cheese subject to the fraud was located in Pinconning, Michigan.

2) The defendants' company, Real Pinconning Cheese, involved in the fraud was located in Pinconning, Michigan.

3) The security agreement that NFO had with RPC was filed in the Eastern District of Michigan.

4) NFO's restraining order to prevent the movement of the cheese at RPC on January 14, 1996 was located in Pinconning, Michigan.

5) The defendants conspired in Pinconning, Michigan to defraud NFO.

6) The defendants' negotiations with Mike Hines to sell the cheese at 25 cents a pound took place in Pinconning, Michigan.

7) The RPC letter confirming the 25-cent sale to Hines was typed on RPC letterhead that was located in Pinconning, Michigan.

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[11] In his motion, Grisel asks the court for the dismissal of counts 9 to 24 and 27 to 50. Since Grisel was acquitted on numerous counts, the court will hereinafter frame Grisel's request to conform with the jury's verdict.

8) Some of the parties on the January 14, 1996 conference call between NFO and the defendants were located in Pinconning, Michigan. That was the conference call in which the defendants lied to NFO about the sale of the cheese.

9) The fraudulent invoices to Hines stating "price to be determined upon inspection" instead of 25 cents per pound were generated at Defendant Mikell's direction in Pinconning, Michigan and faxed from Pinconning.

10) Alan Mikell's letter of January 10, 1996, signed by Mikell and transmitted to Hines on or about that date was prepared in the Eastern District of Michigan and transmitted from here.

11) Both Mikell and Grisel, who were then in Pinconning, engaged Hines in two separate conference telephone calls during the week spanning January 10-12, 1996, in which they introduced Hines to their fraudulent scheme and enlisted his agreement to join in it.

(Gov't Resp. to Venue Mots. at 5-6.)

A. Standard

Proper venue in criminal proceedings is mandated by the Constitution; Article III, § 2, cl. 3, requires that "the Trials of all Crimes . . . shall be held in the State where the said Crimes shall have been committed," and the Sixth Amendment provides that "in all criminal prosecutions, the

accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." This mandate is echoed in Federal Rule of Criminal Procedure 18, which provides, in part, that "the prosecution shall be had in a district in which the offense was committed." When multiple counts are alleged in an indictment, as in the instant case, the government must prove that venue is proper on each count by a preponderance of the evidence. *United States v. Villarini*, 238 F.3d 530, 533 (4th Cir. 2001); *United States v. Corona*, 34 F.3d 876, 879 (9th Cir. 1994); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1188 (2d Cir. 1989) ("When a defendant is charged in more than one count, venue must be proper with respect to each count . . . .").

Where Congress fails to explicitly define venue under a criminal statute, "the locus delicti [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Cabrales*, 524 U.S. 1, 6-7, 118 S. Ct. 1772, 141 L. Ed. 2d 1 (1998) (quotation marks omitted). While some courts have looked to the verbs of the statute to determine the nature of the substantive offense, the Supreme Court recently cautioned against heavy reliance on a "verb test":

> We never before held, and decline to do so here, that verbs are the sole consideration in identifying the conduct that constitutes an offense. While the "verb test" certainly has value as an interpretative tool, it cannot be applied rigidly, to the exclusion of other relevant statutory language. The test unduly limits the inquiry into the nature of the offense and thereby creates a danger that certain conduct prohibited by statute will be missed.

United States v. Rodriguez-Moreno, 526 U.S. 275, 279-80, 119 S. Ct. 1239, 143 L. Ed. 2d 388 (1999). Instead, the Supreme Court has instructed courts to conduct a two-part inquiry: namely, to "initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *Id.* at 279. Thus, venue is proper only in a district in which essential conduct elements of the offense take place. *Id.* at 280; *United States v. Bowens*, 224 F.3d 302, 311 (4th Cir. 2000) ("We therefore hold that the place where a criminal offense is committed is determined solely by the essential conduct elements of that offense.").

B. Analysis

Prior to the trial in this matter, Defendants raised identical arguments as those presented in the instant venue motions. In rejecting the earlier motions, Magistrate Judge Charles E. Binder concluded as follows:

> At this stage, I am persuaded that § 3237(a) is the touchstone for determining the proper outcome of this motion. . . .
>
> The defendants' arguments parse the four corners of the indictment entirely too closely. The charges made in the Second Superceding Indictment are, I suggest, precisely what is contemplated by the second paragraph of § 3237. A conspiracy with overt acts is charged. A long and complicated inter-related series of actions are then charged as being the acts which brought the conspiracy to fruition. That the individual counts are part of an underlying scheme of alleged criminal conduct and that because there is, in the words of § 3237[,] "no express provision by

> enactment of Congress otherwise," I therefore conclude that venue for the challenged counts is appropriate in this district.
>
> I further conclude that the *Cabrales* case cited by counsel is distinguishable in that it effectively involved discrete offenses within different states. In this case, there is an overall conspiracy, which is alleged to have taken place in multiple states in multiple different ways, all of which the government says are charged and listed in the indictment. To summarize, since Congress has not said otherwise, I can only conclude that the conduct charged is a continuing offense and that venue is appropriate in this district.

(9/16/98 Order at 3-4.) This court overruled Defendants' objections to the magistrate judge's September 16th order, finding that such order was not clearly erroneous or contrary to law. (*See* 12/23/98 Order.)

The court now reconsiders its December 23, 1998 order. In the Second Superceding Indictment, both Defendants were charged with conspiracy to commit money laundering, as well as with substantive money laundering and wire and mail fraud offenses. Even if the substantive offenses were committed in furtherance of the money laundering conspiracy, this court must conduct a separate analysis for the substantive crimes and the conspiracy. *United States v. Granados*, 117 F.3d 1089, 1090 (8th Cir. 1997); *Corona*, 34 F.3d at 879 ("The court must conduct a separate venue analysis for the substantive crimes and the conspiracy, even if the substantive crimes are committed in furtherance of the conspiracy."); *United States v. Walden*, 464 F.2d 1015, 1016 (4th Cir. 1972).

1. Mail Fraud Count

The jury returned a guilty verdict on, among other things, count 11 of the Second Superceding Indictment, which charged Grisel with violating either the mail fraud statute, 18 U.S.C. § 1341,[12] or the wire fraud statute, 18 U.S.C. § 1343. Specifically, Grisel was indicted and convicted for the following overt acts:

> On or about January 18, 1996, Christopher Grisel . . . transmitted or caused to be transmitted via the U.S. Postal Service, and/or via facsimile transmission, a letter to Edward Buchberger, E.J. Marketing, Inc., Marathon, Wisconsin, confirming that Innoquest, Inc. was selling eighteen loads of cheese to Buchberger for a price approximately 2 [cents] per pound under the customer price obtained by Buchberger. The letter

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[12] The mail fraud statute provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . or knowingly causes to be delivered by mail or such carrier according to the direction thereon, . . . any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both.

Hence, in order to establish a mail fraud violation, the government must prove the following elements: (1) devising or intending to devise a scheme to defraud; (2) involving the use of the mails; and (3) for the purpose of executing the scheme or attempting to do so. *United States v. Crossley*, 224 F.3d 847, 857 (6th Cir. 2000).

> also stated that all cheese was to be moved by the end of February, 1996. By so stating, as the Defendant Christopher Grisel then well knew, movement of the cheese by the end of February to other purchasers and locations would render it more difficult for NFO, Inc. to trace the physical location of the cheese, thus frustrating NFO, Inc's efforts to receive fair market value therefor . . . .

(2d Superceding Indictment at 19.)

The specific venue statute regarding mail fraud is 18 U.S.C. § 3237(a), which provides that any offense involving the use of mails is a continuing offense and may be prosecuted in any district from, through, or into which such matter moves.[13] *United States v. Holt*, 899 F.2d 15 (Table), 1990

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[13] At least one circuit has held that § 3237(a) does not apply to the mail fraud statute. For example, the Court of Appeals for the Second Circuit has held as follows:

> We agree with defendants that § 3237(a) is best read as not applying to statutes, like the mail fraud statute, that specify that a crime is committed by the particular acts of depositing and receiving mail, or causing it to be delivered, rather than the more general and ongoing act of "using the mails." Rather than make a defendant like Brennan subject to prosecution in any district through which a mail truck carrying his mail happened to drive (or perhaps even in any district over which an airplane carrying the mail happened to fly, or in which it happened to make an interim stop), we think Congress's more particularized and careful phrasing in the mail fraud statute takes it outside the scope of § 3237(a) and is best read less expansively. We therefore hold that prosecution under the mail fraud statute is permissible only in those districts in which a

WL 37613, at *1-2 (6th Cir. Apr. 3, 1990). Nevertheless, § 3237 does not "allow prosecution in any place where a scheme to defraud touches, in the absence of evidence that a defendant caused a mailing . . . to be sent through or to be received in the district." *United States v. Donato*, 866 F. Supp. 288, 292 (W.D. Va. 1994).

It is undisputed that the mail matter in question did not move from, through, or into this district.[14] Nevertheless, the record is clear that the scheme to defraud, including the subject of the fraud, was partially devised and executed in this district. Thus, the primary question before the court is whether venue is appropriate for a prosecution under § 1341 in a district where the mail matter did not move from, through, or into, but where an aspect of the scheme to defraud was devised and executed. This issue is a novel one, especially in light of the Supreme Court decision in *Rodriquez-Moreno*. *See United States v. Brennan*, 183 F.3d 139, 145 (2d Cir. 1999) ("We cannot tell whether the reasoning of *Rodriguez-Moreno* would make venue

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> proscribed act occurs, *i.e.*, in which the defendant "places," "deposits," "causes to be deposited," "takes," or "receives" mail or "knowingly causes" mail "to be delivered."

United States v. Brennan, 183 F.3d 139, 147 (2d Cir. 1999). This court, however, does not need to resolve the relationship between § 1341 and § 3237. Insofar as the court concludes that venue is inappropriate in this district under the expansive version of venue (that is, § 3237), the more restrictive venue would also preclude prosecution in this district.

[14] Even though the Second Superceding Indictment does not state the origin of the mailing/wire communication, it is undisputed that it originated in Texas.

appropriate for a prosecution under § 1341 not only in districts where mail matter was sent or received in furtherance of the fraud scheme, but also in any district where any aspect of the 'scheme or artifice to defraud,' 18 U.S.C. § 1341, was practiced.")

As directed by the Supreme Court, in order to determine the proper venue for an offense, the court must first identify the conduct constituting the nature of the crime and then the location of the commission of the criminal acts. *Rodriguez-Moreno*, 526 U.S. at 279-80. After reviewing the relevant authorities, the court concludes that the nature of a mail fraud offense is the misuse of mail facilities and venue is appropriate only in a district where the misuse occurred. Thus, despite the existence of some aspect of a "scheme or artifice to defraud," prosecution for the contested mail fraud offense is not appropriate here because the misuse of mail facilities occurred outside this district.

The court's conclusion is supported by three mutually enforcing reasons. First, and most importantly, it is well settled that the essence of the mail fraud statute is the use of the mails to facilitate a fraudulent scheme. *United States v. Stull*, 743 F.2d 439, 444 (6th Cir. 1984) ("Use of the federal mails is not only a jurisdictional requirement, it is the gist of the crime of mail fraud."); *United States v. Aldridge*, 484 F.2d 655, 660 (7th Cir. 1973) ("As to the mail fraud counts, it is settled that the gravamen of the offense is the use of the mails . . . ."); *United States v. States*, 488 F.2d 761, 767 (8th Cir. 1973) ("The purpose of 18 U.S.C. § 1341 is to prevent the Postal Service from being used to carry out fraudulent schemes, regardless of what is the exact nature of the scheme and regardless of whether it happens to be forbidden by state law."); *United States v. Salsbury*, 430 F.2d 1045, 1048 (4th Cir. 1970) ("The gravamen of mail fraud is the misuse of a

federal instrumentality in the execution of a fraud."); *Kreuter v. United States*, 218 F.2d 532, 534 (5th Cir. 1955) ("The gravamen of the offense is the use of the mails"); *United States v. Hoffa*, 205 F. Supp. 710, 716 (S.D. Fla. 1962) ("The gist of the offense of the crime charged in this indictment is the use of the mails, and a scheme to defraud need not be set forth with such precision as if it were the gist of the offense.") Hence, it is the causing of the mails to be used in furtherance of the fraudulent scheme that constitutes the offense of mail fraud. While a fraudulent scheme is a component of a mail fraud charge, it is not "the nature of the crime."

Second, the sparse legislative history of the mail fraud statute reinforces the concept that the essential conduct element of the offense is the misuse of mail facilities, not the fraudulent activity. The Supreme Court echoed this sentiment in *Kann v. United States*, 323 U.S. 88, 65 S. Ct. 148, 89 L. Ed. 88 (1944), stating that "the federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." 323 U.S. at 95. "Congress sought to protect the integrity of the United States mails by not allowing them to be used as 'instruments of crime.'" *McNally v. United States*, 483 U.S. 350, 365, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987) (Stevens, J., dissenting) (citing *United States v. Brewer, 528 F.2d 492, 498 (4th Cir. 1975)).* Hence, the purpose of the mail fraud legislation is to protect the postal agency, not to prevent frauds in general, a task within the province of state law:

> The focus of the statute is upon the misuse of the Postal Service, not the regulation of state affairs, and Congress clearly has the authority to regulate such

> misuse of the mails. *See Badders v. United States*, 240 U.S. 391, 393, 60 L. Ed. 706, 36 S. Ct. 367 . . . (1916): "The overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. * * * Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme it regards as contrary to public policy, whether it can forbid the scheme or not." The purpose of 18 U.S.C. § 1341 is to prevent the Postal Service from being used to carry out fraudulent schemes, regardless of what is the exact nature of the scheme and regardless of whether it happens to be forbidden by state law. *See Parr v. United States*, 363 U.S. 370, 389, 390, 80 S. Ct. 1171, 4 L. Ed. 2d 1277 . . . (1960); *cf. Brady v. United States*, 24 F.2d 405, 407 (8th Cir. 1928). "Congress definitely intends that the misuse of the mails shall be controlled even though it be its policy to leave the control of elections to the several States." *United States v. Classic*, 35 F. Supp. 457, 458 (D.C. La. 1940).

States, 488 F.2d at 767.

Finally, the importance of a fraudulent scheme is further undermined by three related areas of case law. First, one well-established line of cases demonstrate that the success of the scheme is not essential to the crime. *See Schmuck v. United States*, 489 U.S. 705, 715, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989) ("The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud."); *United States v. Martin*, 228 F.3d

1, 16 (1st Cir. 2000); *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000); *United States v. Bach*, 172 F.3d 520, 522 (7th Cir. 1999) ("It is irrelevant that the mailings failed in their purpose; a scheme to defraud need not succeed to violate the mail fraud statute."); *Kreuter v. United States*, 218 F.2d 532, 535 (5th Cir. 1955) ("Success of the scheme is not essential to completion of the offense and it is not necessary to prove communication of the alleged false representations to the victims.") This underscores the point that the misuse of the mail, and not the fraudulent scheme, is the conduct constituting the offense.

A second area of analysis conclude that the statute of limitations begins to run from the completion of the mailing, not the completion of the scheme. *See United States v. Crossley*, 224 F.3d 847, 859 (6th Cir. 2000) ("The offense of mail fraud is completed and the statute of limitations begins to run on the date on which the defendant, depending on the specific use of the mails charged in the indictment, places, deposits, causes to be deposited, takes, or receives mail, or knowingly causes mail to be delivered as part of the execution of a scheme to defraud" (internal quotation marks omitted).); *United States v. Eckhardt*, 843 F.2d 989, 993 (7th Cir. 1988) ("It is well-settled that the statute of limitations for . . . mail fraud does not begin running with the completion of the fraud scheme; rather, it runs from the date of the charged call or mailing in furtherance of the scheme. It is irrelevant when the fraud scheme itself ended, so long as the charged call or mailing took place within the statutory period" (internal citations omitted).) It is well-settled law that the statute of limitations begins to run when each element of the crime has occurred and the crime is complete. *Toussie v. United States*, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970); *Crossley*, 224 F.3d at 859; *United States v. Lutz*, 154 F.3d 581, 586 (6th Cir. 1998). Insofar as the Court of Appeals for

the Sixth Circuit ("Sixth Circuit"), as well as other circuits, has deemed that the elements of a mail fraud crime have occurred upon the completion of the mailing, despite the continuation of the fraudulent scheme, it is difficult to contend that the fraudulent scheme is the essence, or part of the essence, of a mail fraud crime.

Finally, it is well-settled that multiple mail fraud convictions can stem from the same fraudulent scheme without offending the constitutional prohibition against double jeopardy. *See Badders*, 240 U.S. at 394 ("There is no doubt that the law may make each putting of a letter into the postoffice a separate offense."); *United States v. Gardner*, 65 F.3d 82, 85 (8th Cir. 1995); *United States v. Johnson*, 612 F.2d 843, 845-46 (7th Cir. 1979). The courts have reasoned that, under the mail fraud statute, "it is not the plan or scheme that is punished, but rather each individual use of the mails in furtherance of that scheme." *Gardner*, 65 F.3d at 85. Moreover, when Congress proscribes distinct acts, then separate prosecutions are permissible even if the acts were committed in furtherance of the same criminal enterprise. *Id.*; *Johnson*, 612 F.2d at 846. Thus, the separate instances of mailings, the individual acts targeted by the mail fraud statute, can be prosecuted separately despite the presence of a single fraudulent scheme. *Gardner*, 65 F.3d at 85. Once again, this treatment of the mail fraud statute illustrates that the fraudulent scheme is not "the nature of [the mail fraud] crime."

Other courts have held similarly. In *United States v. Donato*, 866 F. Supp. 288 (W.D. Va. 1994), the district court dismissed two counts of mail and wire fraud for failure by the government to allege facts showing that the Western District of Virginia was the proper venue for the prosecution of those actions. The *Donato* court held that "venue under the mail

and wire fraud statutes lies at the place where an individual causes a mailing or wire communication to be sent or received." *Donato*, 866 F. Supp. at 292. It reasoned in pertinent part as follows:

> Though mail and wire fraud are continuing offenses, venue is not as expansive as the Government argues. Section 3237(a) does not allow prosecution in any place where a scheme to defraud touches, in the absence of evidence that a defendant caused a mailing or interstate wire communication to be sent through or to be received in the district. The mail and wire fraud statutes punish the use of the mails or wires in pursuit of a scheme to defraud; fraudulent activity cannot form the basis for venue unless it is related to these offenses. *See* §§ 1341, 1343. Under the rule established by *Kreuter v. United States*, 218 F.2d 532 (5th Cir.), *cert. denied*, 349 U.S. 932, 75 S. Ct. 777, 99 L. Ed. 1262 . . . (1955) and *United States v. Hoffa*, 205 F. Supp. 710 (S.D. Fla.), *cert. denied*, 371 U.S. 892, 83 S. Ct. 188, 9 L. Ed. 2d 125 . . . (1962), venue in mail fraud actions is not proper in the district where a scheme to defraud is hatched absent evidence establishing that a defendant sent, received, or caused the sending or receiving of mail matter in the district. By analogy, the same rule applies to wire fraud prosecutions. This rule prevents establishing venue on the basis of a defendant's activities or presence in a district where such activities or presence are unrelated to any act punishable under § 1341 or § 1343. The federal venue statute does not override the definition of the offenses in the mail or wire fraud statutes, to which this court must look when determining venue under the principles of *Walden*; it simply allows the prosecution of such offenses to be maintained

> wherever the mails or wires have been used in the course of a scheme to defraud.

Donato, 866 F. Supp. at 292-93. The *Donato* court relied upon the rule established in *Kreuter v. United States*, 218 F.2d 532 (5th Cir. 1955) and *United States v. Hoffa*, 205 F. Supp. 710 (S.D. Fla. 1962). Specifically, these courts held that "it has been well settled that, in a prosecution for mail fraud, the offense is committed and trial may be had only in the place of mailing or the place of receipt of the mail or in the place through which the mail has passed." *Hoffa*, 205 F. Supp. at 722. Thus, "the place where the scheme is conceived or put in motion is totally immaterial and cannot serve as venue in prosecution for mail fraud." *Id.; accord Kreuter*, 218 F.2d at 534; *Baker v. United States*, 115 F.2d 533, 537 (8th Cir. 1940).[15] While these decisions were rendered pre-*Rodriguez-Moreno*, the court finds that the reasoning still holds true.

In the instant matter, there is no allegation that the mailings touched this district.[16] In its response to the venue motions, the Government highlights Defendants' numerous

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[15] "The use of the Post Office Department in the execution of the alleged scheme to defraud or obtain money by false pretenses is the gist of the offense, which the statute denounces. The devising of a scheme to obtain money by means of fraud or false pretenses is not a crime under the laws of the United States. It becomes a crime only in the event the United States mails are used in carrying out the scheme." *Baker*, 115 F.2d at 537.

[16] The Government does not contest this conclusion. (*See* Gov't 5/14/99 Resp. at 9 ("The indictment does not allege that any of the mailings . . . in [Count 11] touch Michigan.").)

ties with this district. Those ties, however, pertain to the fraudulent scheme, not the charged misuse of the mail.

The Government incorrectly relies on the "overall conspiracy which is alleged to have taken place in multiple states in multiple different ways" and the fact that mail fraud is a continuing offense. (Venue Mots. at 4.) As discussed earlier, the continuing offense statute, § 3237, does not permit prosecution in any place where the scheme touches; instead, it requires prosecution where the charged mailing initiated, passed through, or was completed. *Donato*, 866 F. Supp. at 292. Moreover, the overall conspiracy is irrelevant in the court's determination of proper venue. Even if the mail fraud offense were committed in furtherance of the overall conspiracy, the court must conduct a separate venue analysis for each charged offense. *Granados*, 117 F.3d at 1090; *Corona*, 34 F.3d at 879; *Walden*, 464 F.2d at 1016. To hold otherwise would afford the government unfair advantage over the defendants. *See Walden*, 464 F.2d at 1020 ("A decision by the United States to prosecute for conspiracy is not without some advantages to the government. To add to the advantages already existing by engrafting a forum shopping option as to the substantive offenses would . . . go too far. To repeat, venue is not mere formalism. The right to a trial before a jury of the vicinage is fundamental and such a trial ought to be held at the place of commission of the substantive offense. The Sixth Amendment may not be ignored . . . .")

Though not directly articulated by the Government, there is a question of whether venue is proper based on the substantial contacts that Defendants had with this district and the effects of such contacts felt by this district. This court has been able to discover only one scenario in which a defendant's "substantial contacts" are considered for venue purposes. In *United States v. Reed*, 773 F.2d 477 (2d Cir. 1985), the Court

of Appeals for the Second Circuit ("Second Circuit") created the substantial contacts test, holding that

> a review of relevant authorities demonstrates that there is no single defined policy or mechanical test to determine constitutional venue. Rather, the test is best described as a substantial contacts rule that takes into account a number of factors--the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate factfinding . . . .

773 F.2d at 481. This test has been adopted by the Sixth Circuit. *See United States v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986).

Nevertheless, the substantial contacts test does not apply to the instant action:

> The framework arising out from *Beddow* . . . is to first determine on a count-by-count basis if each count in the indictment is one that is a continuous crime. If it is, then venue is proper for that count in any district where the crime alleged therein began, continued, or ended. 18 U.S.C. § 3237(a). In deciding which district should try the case, a court should next apply the [*Reed*] factors[.]

United States v. Hunter, 863 F. Supp. 462, 471 (E.D. Mich. 1994); *see United States v. Saavedra*, 223 F.3d 85 (2d Cir. 2000) (applying a two part inquiry in which the court must determine whether the offense in question is a continuing offense and then analyze whether the criminal activities bear substantial contacts with the district). As recently stated by the

Second Circuit, the substantial contacts test "offers guideline on how to determine whether the location of venue is constitutional, especially in those cases where the defendant's acts did not take place within the district selected as the venue for trial." *Saavedra*, 223 F.3d at 93. The test thus defines "the outer limits on how broadly Congress may define a continuing offense and thereby create multiple venue." *Id.* at 92-93.[17]

Hence, the substantial contacts test becomes relevant only if the continuing offense began, continued, or ended in this district. For the reasons already set forth, this court has already determined that mail fraud crime began, continued, and ended outside this district. Hence, it is unnecessary to evaluate whether Defendants' criminal activities bear sufficiently substantial contacts with this district as to pass Constitutional muster.

Moreover, with respect to statutes for which Congress has not defined the conduct elements in terms of effects, the courts have never held that venue may be based on the effects of criminal conduct alone. *See Rodriguez-Moreno*, 526 U.S. at 279 n.2 ("The Government argues that venue also may permissibly be based upon the effects of a defendant's conduct in a district court other than the one in which the defendant performs the acts constituting the offense. Because this case

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[17] "Notwithstanding Congress'[s] power to define continuing offenses having the potential for multiple venues, the Supreme Court has repeatedly recognized that a cautious interpretive approach is 'more consonant with the considerations of historic experience and policy which underlie [the venue] safeguards in the Constitution.'" *Saavedra*, 223 F.3d at 92 (citing *United States v. Johnson*, 323 U.S. 273, 275, 89 L. Ed. 236, 65 S. Ct. 249 (1944)).

only concerns the locus delicti, we express no opinion as to whether the Government's assertion is correct" (citation omitted).)

Thus, although venue may lie "where the effects of the defendant's conduct are felt," this is true "only when Congress has defined the essential conduct elements in terms of those effects." *Bowens*, 224 F.3d at 314. Here, there is no evidence that Congress has defined--or that the courts have interpreted-- mail fraud crimes to extend to districts where the fraudulent scheme, but not the misuse of the mails, occurred. If Congress intended to create such a venue provision for this type of crime, it could have chosen to do so. As cited by the *Reed* court, some examples of venue provisions based solely on the effects of the offense can be found in the Hobbs and the Taft-Hartley Acts, bail jumping statutes, and in statutes addressing the inducement of the unlawful entry of immigrants. *Reed*, 773 F.2d at 482. No such provision exists for mail fraud offenses.

Accordingly, the mail fraud aspect of Count 11 must be dismissed for improper venue.[18] The mail fraud statute

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[18] *Contra* 2 Charles Alan Wright, Federal Practice and Procedure § 303 (3d ed. 2000) ("Although it is commonly said that mail-fraud cases may be prosecuted in the district of mailing or receipt or, since 1948, districts through which the mail has moved, and may not be prosecuted elsewhere, it can be fairly argued that the place where the scheme to use the mails to defraud was devised is also a proper venue" (internal footnotes omitted).) The cases cited by Mr. Wright, however, do not support his assertion. In fact, one of the cited cases held to the contrary. In *United States v. Cashin*, 281 F.2d 669, 674 (2d Cir. 1960), the court stated in relevant part as follows:

criminalizes the misuse of the mails, and not the fraudulent scheme that such misuse facilitated. Since the misuse of the mails occurred outside this district, Grisel's conviction must be arrested pursuant to Rule 34.

2. Wire Fraud Counts

Title 18 of the United States Code, section 1343, provides in relevant part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses,

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> It has long been settled that in prosecution for mail fraud trial may be had only in the place of mailing, the place of receipt of the mail, and places through which the mailed matter passed. . . . The purpose of the mail fraud statute is to protect against the "use of the United States mails in furtherance of . . . (the) scheme," while the evil at which the Securities Act is directed is the fraud in the sale of securities. It is entirely reasonable that under each statute trial should be had at the place where the primary evils at which the law is directed occur. Moreover, we cannot ignore the fact that the venue rule for mail fraud cases was developed many decades ago, when more restricted notions of limits of federal power prevailed than exist today. Were the issue of appropriate place of trial in such cases to arise *de novo* in 1960, it is by no means clear that trial would not be permitted at the place where the fraudulent scheme was developed as well as at the places where the mailing has its impact.

Nevertheless, even though the *Cashin* court did not extend the restricting rule to securities cases, it found "no compelling reason to change the already settled doctrine for mail fraud cases." *Id.*

> representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

Thus, to establish a defendant's liability under § 1343, the Government must, establish three elements: namely, (1) a scheme or artifice to defraud; (2) use of interstate wire communications in furtherance of the scheme; and (3) intent to deprive a victim of money or property. 18 U.S.C. § 1343; *United States v. Prince*, 214 F.3d 740, 747-48 (6th Cir. 2000). As with a mail fraud offense, a wire fraud crime is a continuing offense subject to the venue provisions of § 3237(a), which provides in relevant part that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

There is no dispute that the wire communications at issue were sent, passed through, and received outside this district. Specifically, Defendants were convicted, *inter alia*, on counts relating to the following wire communications:

(1) between Oklahoma and Ohio (count 8);

(2) between Ohio and either Texas or South Dakota (count 9);

(3) between Texas and Wisconsin (count 10);

(4) between Texas and Wisconsin (count 11);[19]

(5) between Texas and South Dakota (count 13);

(6) between Texas and California (count 14);

(7) between Texas and either Ohio or Michigan [20] (count 22);

(8) between Texas and South Dakota (count 23);

(9) between Texas and Wisconsin (count 24); and

(10) between Ohio to Oklahoma (count 25).

Once again, the court is confronted with a situation where the actual communications were committed outside this district, but the fraudulent scheme was partially devised and executed in this district. Hence, the court must determine whether venue is appropriate for a prosecution under § 1343 in a district in which the wire communications were neither dispatched, sent through, nor received, but where an aspect of the scheme to defraud was devised and executed.

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[19] The mail fraud aspect of this count was discussed in a prior section of this order.

[20] It is the Government's burden to establish proper venue by a preponderance of the evidence. Insofar as the only evidence presented indicated that Dennis Tonak did not know where he was when he spoke by telephone with Defendant Grisel, who was in Texas at that time, the court must assume, for purposes of this count, that the Michigan connection has not been established.

After reviewing pertinent authorities, the court must conclude that, despite the presence of a fraudulent scheme, prosecution for the contested wire fraud offenses is not appropriate in this district. This conclusion is deduced from the case law regarding mail fraud. Since mail and wire fraud statutes share similar statutory language, courts have applied the same substantive analysis to these statutes. *Carpenter v. United States*, 484 U.S. 19, 25 n.6, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); *United States v. Thorpe*, 166 F.3d 1216 (Table), 1998 WL 738624, at *6 (6th Cir. 1998) ("Although *Belt* was a wire fraud case, its analysis is applicable to mail fraud statute under § 1341. This is because the wire fraud statute (§ 1343) and the mail fraud statute (§ 1341) are, according to the Supreme Court, to be given a similar construction and are subject to the same substantive analysis."). Thus, for the reasons stated in section II(B)(1) and in light of the fact that "the gravamen of [a wire fraud] offense is simply the misuse of interstate communication facilities to execute any scheme or artifice to defraud," *United States v. Condolon*, 600 F.2d 7, 8 (4th Cir. 1979), the court finds that the misuse of the wire facilities is the essential conduct element of a wire fraud crime. While the Government must prove the existence of a "scheme or artifice to defraud" to establish liability under the wire fraud statute, the fraudulent activity alone cannot form the basis for venue.

Insofar as none of the wire communications in the challenged counts touched this district, the court must arrest judgment of these counts for improper venue pursuant to Rule 34.

3. Money Laundering Counts

In Count 27 of the Second Superceding Indictment, Mikell is charged with money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 2. Specifically, the indictment provides that Mikell committed the following overt acts:

> On or about February 20, 1996, after repeatedly misleading representatives of NFO, Inc. and others as to the price that had been obtained for the cheese, and having taken steps to move the cheese and hide proceeds derived therefrom in order to frustrate efforts to determine the true price that had been obtained, Mikell, Christopher Grisel, and Hines, tendered and caused to be tendered to Concord Growth on behalf of NFO, Inc., a wire transfer in purported payment for the cheese of approximately $186,670.91 . . . .

(2d Superceding Indictment at 32-33.)

Grisel was similarly charged with money laundering in Counts 15-20 and 29 of the indictment. In particular, in Counts 15-20, the indictment asserts that Grisel committed the following overt acts:

> Following his (Hines's) receipt from E.J. Marketing, Inc. (Edward Buchberger) of the proceeds from cheese sold by Innoquest, Inc. to E.J. Marketing, and at the request of Christopher Grisel, Hines wire transferred or caused to be wire transferred, from Nor-Tech, Inc., to Innoquest, Inc., a total of approximately $565,000. The aforesaid wire transfers were made on or about the individual dates set forth below:

Count	Date of Wire Transfer	Amount of Wire Transfer	Description
15	01/16/96	$50,000.00	From Nor-Tech to Innoquest
16	01/19/96	$25,000.00	From Nor-Tech to Innoquest
17	01/25/96	$90,000.00	From Nor-Tech to Innoquest
18	02/02/96	$150,000.00	From Nor-Tech to Innoquest
19	02/09/96	$100,000.00	From Nor-Tech to Innoquest
20	02/22/96	$150,000.00	From Nor-Tech to Innoquest

(2d Superceding Indictment at 23-24.) In Count 29, then indictment charges Grisel with the following acts on or about May 5, 1996:

B. Two of the loads of cheese initially sold to Nor-Tech, Inc. (Hines) to Sorrento Cheese Company (Sorrento) were rejected by Sorrento because of the quality standards and specific tolerances for

> cheeses required by Sorrento. These two loads were returned to RPC by Sorrento.
>
> C. Subsequently, these two loads of cheese were sold by RPC (Mikell) to Nor-Tech, Inc. (Hines) for approximately 25 [cents] per pound. This cheese was then re-sold by Nor-Tech, Inc. to MCT Dairies, Inc., Maplewood, New Jersey, for approximately $1.00 per pound, generating sale proceeds of approximately $83,420.18. Nor-Tech, Inc. (Hines) retained $66,752.99. The balance of approximately $16,667.19 was remitted to Nor-Tech, Inc. to Innoquest, Inc. (Christopher Grisel).

(*Id.* at 35.)

The money laundering statute, 18 U.S.C. § 1956, provides, in relevant part, that

> whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity . . . with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(1)(A)(i). Hence, the elements of this offense are:

(1) the use of funds that are proceeds of unlawful activity;

(2) knowledge that the funds are proceeds of unlawful activity; and

(3) conduct or attempt to conduct a financial transaction, knowing that the transaction is designed in whole or in part to disguise the nature, location, source, ownership or control of the proceeds.

United States v. Prince, 214 F.3d 740, 747 (6th Cir. 2000).

Defendants ask the court to reach the same conclusion as the Supreme Court in *United States v. Cabrales*, 524 U.S. 1, 118 S. Ct. 1772, 141 L. Ed. 2d 1 (1998). In *Cabrales*, the defendant deposited $40,000 with the AmSouth Bank of Florida and, within a week's period, made four separate withdrawals of $9,500 each from the bank. The money at issue was traceable to the illegal sale of cocaine in Missouri. Thus, the money laundering occurred wholly in Florida but the money was derived from unlawful activities in Missouri. The Supreme Court held that Missouri was not a proper venue for the trial of the money-laundering offenses at issue, stating, *inter alia*, that the money laundering statute "interdict[s] only the financial transactions . . . , not the anterior criminal conduct that yielded the funds allegedly laundered." *Cabrales*, 524 U.S. at 7.

It is undisputed the wire transfers at issue were from South Dakota to Texas (Counts 15-20, 29) and to California (Count 27). Thus, these financial transactions occurred outside this district. Nevertheless, the Government asserts that venue for these counts is proper because

> this case is . . . a continuing offense and can be brought pursuant to 18 U.S.C. § 3237(a), which states that a continued offense begun in one district and completed in another may be prosecuted in any district in which such offense was begun, continued or completed. This case was a continuing offense in which all the actions are interwoven. First, Mikell and Grisel make a plan to sell the cheese back to themselves through the help of Michael Hines. They then deceive NFO about the sale in order to give themselves enough time to consummate the sale and launder the proceeds through Hines'[s] company back to themselves and NFO. An essential part of the elaborate deception set forth in the overt acts took place in Pinconning, Michigan, when at Mikell's direction Gwizdala faxed false and misleading invoices to NFO stating that the price would be determined upon inspection.

(Gov't 5/14/99 Resp. at 6.[21])

The Government's assertion is only partially correct. The *Cabrales* court recognized that "money laundering . . . arguably might rank as a 'continuing offense,' triable in more than one place, if the launderer acquired the funds in one district and transported them into another." 524 U.S. at 8 (citation omitted). Nevertheless, money laundering crimes are not continuing offenses simply because "all the actions are interwoven," as asserted by the Government. Instead, they are continuing offenses, if at all, because the financial transactions (1) were begun in one district and completed in

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[21] In response to the instant venue motions, the Government incorporated the arguments set forth in the May 14, 1999 brief.

another or (2) committed in more than one district. 18 U.S.C. § 3237.

Despite the Government's assertions to the contrary, the anterior criminal activities in themselves, even for continuing offenses, are not relevant. As interpreted by the Supreme Court, the money laundering statute does not proscribe "the anterior criminal conduct that yielded the funds allegedly laundered." *Rodriguez-Moreno*, 526 U.S. at 280 n.4 (citing *Cabrales*, 524 U.S. at 7). The Supreme Court reasoned that the existence of criminally generated proceeds was a "circumstance element" of the offense, not the essential conduct element as required for venue analysis. *Id.*

The question before the court then is whether *Cabrales* is distinguishable from the instant circumstances because Defendants, unlike the defendant in *Cabrales*, are also charged with the anterior criminal conduct. In *United States v. Villarini*, 238 F.3d 530 (11th Cir. 2001), the defendant--like Defendants in this action--was charged with money laundering offenses in the district where the anterior conduct occurred. There, the defendant Karen Villarini had embezzled money from the Bank of Floyd in Roanoke, Virginia, where she was employed as the head teller. Thereafter, she resigned from her employment and moved to Florida, where she committed four financial transactions that were the bases of the money laundering counts. The Court of Appeals for the Eleventh Circuit rejected the government's contention that venue was proper in the Western District of Virginia, concluding that "both *Cabrales* and *Rodriguez-Moreno* clearly establish that the mere fact that proceeds were criminally generated in a particular district is not sufficient, standing alone, to establish proper venue in that district for a charge of laundering the money." *Villarini*, 238 F.3d at 535.

This court agrees. It is clearly established that venue must be proper as to each count. Thus, in order to satisfy its burden of establishing venue by a preponderance of the evidence, the Government is not permitted to piggyback the faulty venue of the money laundering counts by latching them onto the wire fraud counts that are properly before the court.[22] As with the mail and wire fraud counts, the court must "initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *Rodriguez-Moreno*, 526 U.S. at 279.

It is well-established that the nature of the money laundering crime is the financial transaction, not the anterior criminal conduct. *Cabrales*, 524 U.S. at 7. The existence of the anterior criminal activity is only a "circumstance element" of the money laundering, *Rodriguez-Moreno*, 526 U.S. at 280 n.4, not one of the essential conduct elements of the offense. Hence, the court concludes that the existence of the anterior criminal activities in this district is not sufficient, in itself, to warrant a finding of proper venue.

While this court is confident in its conclusion, it will note that a panel of the Sixth Circuit has implied otherwise, *in dicta*, in an unpublished decision. In *United States v. Aronds*, 2000 U.S. App. LEXIS 4145; 210 F.3d 373 (Table), 2000 WL 303003 (6th Cir. 2000), the court found that "*Cabrales* does not decide the appropriate venue when the defendant is charged with both money laundering and with the underlying crime." 2000 U.S. App. LEXIS 4145, *35, *2000 WL 303003,*

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[22] The specified unlawful activities of the instant money laundering crimes also include mail fraud offenses. Insofar as the court has concluded that this district was not the proper venue to try Grisel's sole mail fraud conviction, the mail fraud offense is not included in this aspect of the analysis.

at *11. The court stated that *Cabrales* is distinguishable to the extent that Aronds, the defendant in the matter, was also charged with the anterior criminal acts that yields the funds allegedly laundered. *Id.* The court did not expand on this concept, however, because the defendant waived the issue by failing to raise it in the district court. Notwithstanding, the court expressed its concerns about the effects of a successful venue challenge:

> a venue challenge would have meant that, if successful, defendant would have been required to defend himself in two trials in two different states--one for his underlying crimes and the other for the laundering of the proceeds of those crimes. Not only would this have caused additional expense and inconvenience to Aronds, but it would have wasted resources of two branches of the United States government.

Aronds, 2000 WL 303003, at *12.

While these fiscal concerns are certainly legitimate, they cannot override a defendant's Constitutional rights. The Constitution clearly mandates that "the Trials of all Crimes . . . shall be held in the State where the said Crimes shall have been committed" U.S. Const. art. III, § 2, cl. 3; *see also* U.S. Const. amend. VI. Moreover, the Supreme Court has repeatedly articulated a rule favoring restrictive construction of venue provisions. *See Travis v. United States*, 364 U.S. 631, 634, 5 L. Ed. 2d 340, 81 S. Ct. 358 (1961) ("Venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of a tribunal favorable to it" (internal quotation marks omitted).); *United States v. Cores*, 356 U.S. 405, 407, 78 S. Ct. 875, 2 L. Ed. 2d 873 (1958); *United States v. Johnson*, 323 U.S. 273, 276,

65 S. Ct. 249, 89 L. Ed. 236 (1944)[23] ("If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.").

Thus, the court finds that efficiency concerns, while legitimate, cannot take precedence over a defendant's right to proper venue. A defendant may, if desired, waive his right to proper venue in order to economize his resources. The government may not, however, preclude defendant from enforcing his right to demand a trial in the proper district.[24]

It appears that the Sixth Circuit may have relied on the Supreme Court's decision in *United States v. Lombardo*, 241 U.S. 73, 36 S. Ct. 508, 60 L. Ed. 897 (1916), in formulating the *dicta* set forth in *Aronds*. The *Lombardo* Court stated, among other things, that "where a crime consists of a distinct part which has different localities the whole may be tried where any part can be proved to have been done." 241 U.S. at 77. The *Rodriguez-Moreno* court found this statement to be significant in its conclusion that venue is proper for a violation of 18 U.S.C. § 924(c)(1) in any district where the crime of violence was committed. This statement is inapplicable for resolving the instant issue, however, because the anterior criminal conduct is not a distinct part of the

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[23] Even though Congress passed § 3237 in response to the *Johnson* decision, the general validity of the stated rule of construction is not affected. *See Brennan*, 183 F.3d at 147.

[24] As discussed earlier, Congress may define a crime in terms of its effects, which may promote the efficiency concerns stated by the *Aronds* court.

money laundering offenses; the money laundering statues do not proscribe such conduct.

This court is aware that the facts of the *Cabrales* decision are distinguishable in many aspects from those in the instant action. For example, unlike Defendants, Cabrales were charged with a criminal activity (that is, money laundering) that took place after the anterior criminal conduct was begun and completed by others. Moreover, the funds laundered by Cabrales were not transported to another district; instead, all of the financial transactions occurred in Florida. Cabrales was not charged with a conspiracy count, while Defendants were charged with a conspiracy to violate the money laundering statute, in violation of 18 U.S.C. § 1956(h). Finally, Cabrales was charged with subsection (a)(1)(B)(ii) of § 1956, whereas Defendants were charged with subsection (a)(1)(A)(i).

Nevertheless, these distinctions are not significant because they do not detract from the principal lessons of the *Cabrales* decision. The *Cabrales* Court clearly defined the nature of a money laundering offense as one that "interdict[s] only the financial transactions . . . , not the anterior criminal conduct that yielded the funds allegedly laundered." *Id.* at 7. Thus, insofar as the financial transactions in question occurred outside the Eastern District of Michigan, venue is not proper here. The fact that the anterior criminal conduct of Defendants, as well as the conspiracy to commit the criminal activity, occurred in this district is of no moment. As stated in earlier sections, the government must prove that venue is proper on each count by a preponderance of the evidence, *Villarini*, 238 F.3d at 533; *Corona*, 34 F.3d at 879; *Beech-Nut Nutrition*, 871 F.2d at 1188, and even if the substantive offenses were committed in furtherance of the money laundering conspiracy, this court must conduct a separate analysis for the substantive crimes and the conspiracy,

Granados, 117 F.3d at 1090; *Corona*, 34 F.3d at 879; *Walden*, 464 F.2d at 1016. Morever, even if the money laundering offenses in question are continuing offense under § 3237, Defendant did not begin, continue, or complete the financial transactions in question (that is, the money laundering offenses) in this district.

Accordingly, Defendants' convictions on Counts 15 to 20, 27, and 29 must be arrested for improper venue pursuant to Rule 34.

IV. MATERIALITY MOTIONS

Defendants next argue that Counts 1 through 7[25] should be vacated because, irrespective of whether there is any evidence of deceptive conduct or scheme, there is insufficient evidence of fraud if the alleged object of the scheme is not the money or property of the alleged victim.[26] The Government disagrees, asking the court to deny this set of motions.

Even though Defendants present numerous grounds in support of this set of motions, the only meritorious argument concerns NFO's perfection of its secured interest in the

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[25] Count One charges Defendants with conspiracy to commit money laundering, while the remaining counts charge Defendants with wire fraud offenses.

[26] In addition to Counts 1 through 7, Defendants assert that Counts 8-11, 13-20, 22-25, 27, and 29 should also be vacated. In light of the court's resolution of the venue motions, only Counts 1 to 7 remain pertinent for purposes of this set of motions. If the court had jurisdiction over the other counts of the Second Superceding Indictment, however, those counts must be dismissed for the reasons stated here.

collateral at issue. More specifically, Defendants argue that the Government averred consistently throughout this action that Dore's Pinconning Cheese, Inc., Paul's Pinconnning Cheese, Inc., Earthsafe Enterprises, Inc., and Real Pinconning Cheese L.C. all constituted a single and continuous enterprise, the same cheese plant, under the continuous control of Defendants. Following the Government's theory, Defendants assert that the cheese plant granted security interests in RPC's inventory and accounts receivable to creditors other than NFO, including Dore & Associates Contracting ("Dore") and Earthsafe Enterprises, Inc. ("Earthsafe").[27] While all of the secured creditors filed UCC financing statements of public record, Dore was the first to file the statement, followed by Earthsafe, NFO, and then Concord Growth. Since Dore and Earthsafe were owed a secured debt in an amount greater than the collateral at issue, Defendants argue that NFO's security interest does not have any value.

In resolving post-verdict motions, a court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *United States v. Young*, 208 F.3d 216 (Table), 2000 WL 222590, at *2 (6th Cir. Feb. 15, 2000) (citation omitted). After reviewing the evidence from the appropriate perspective, the court finds that no rational trier of fact could have found the essential elements of the charged counts beyond a reasonable doubt; thus, Defendants are entitled to a judgment of acquittal as a matter of law.

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[27] Earthsafe later assigned its security interest to the DPC Buy-out Group.

Both mail and wire fraud crimes require a "scheme or artifice to defraud."[28] 18 U.S.C. §§ 1341, 1343. "The words 'to defraud' commonly refer 'to wrongdoing one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *McNally*, 483 U.S. at 358 (*quoting Hammerschmidt v. United States*, 265 U.S. 182, 188, 44 S. Ct. 511, 68 L. Ed. 968 (1924)). "A scheme to deceive, however dishonest the method employed, is not a scheme to defraud in the absence of a property right for the scheme to interfere with." *UnitedStates v. Pierce*, 224 F.3d 158, 165 (2d Cir. 2000) (citing *Carpenter v. United States*, 484 U.S. 19, 27-28, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987)).

A security interest is a property right, and the taking of a security interest by fraud will support a conviction under the mail fraud statute provided that other statutory elements are met. *Ward v. United States*, 845 F.2d 1459, 1462 (7th Cir. 1988). It is undisputed that NFO and RPC entered into a "Collateral Pledge and Security Agreement" ("Agreement"), which gave NFO a security interest in "all of [RPC]'s right, title and interest in and to inventory cheese products and goods, whether manufactured or produced by [RPC] or on behalf of [RPC] or obtained otherwise by [RPC], including all warehouse inventory thereof wherever located." (Security Agreement at 2.) The only crucial issue thus is whether NFO's "security interest" had any value during the relevant times of the fraud in question.

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[28] Insofar as the courts have applied the same substantive analysis to mail fraud and wire fraud statutes, this court will hereinafter use the terms "mail fraud" and "wire fraud" interchangeably.

Throughout the trial, the Government averred that the cheese plant, despite its numerous names, was a single business entity from 1994 to 1996. Whether this averment is necessarily true is irrelevant; the court must look at the evidence in the light that is most favorable to the Government and accept the Government's reasonable presentation of the facts. Thus, following the Government's contention, the court finds that two creditors, Dore and Earthsafe, secured their rights before NFO.[29]

As explained by the court during its jury instructions:

> If any other creditor like Earthsafe also obtained a security interest in the cheese inventory and accounts receivable, then the creditor who filed its mortgage first, was entitled to take the receivables and cheese inventory and apply that property to its debt until the debt was paid in full.

(Jury Instructions at 30-31.) The evidence reveals that Dore was owed a secured debt worth over $3 million and that Earthsafe was owed a secured debt worth at least $850,000. Considering the evidence that the cheese cost, at most, $1.40 per pound, the 771,338.9 pounds of cheese at issue was worth approximately only $1 million. Thus, NFO's security interest had no value because the combination of Dore's and Earthsafe's accounts exceeded the market value of the cheese at issue.[30]

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[29] Dore has a security interest in Pinconning Cheese, Inc., and Earthsafe has a security interest in Dore's Pnconning Cheese, Inc.

[30] That Defendants chose to pay NFO ahead of the other two secured creditors does not elevate the status of NFO's account.

In its response, the Government points to numerous incidents of suspicious behavior. For example, the Government rhetorically asks, "If there was no security interest, or only a worthless one, then why did Mikell pay NFO (through Concord) anything?"[31] (Gov't Resp. to Materiality Mots. at 12 (emphasis in original).) Moreover, the Government queries why Defendants "made extensive efforts to prevent NFO from receiving the total cheese proceeds if NFO had no legal right to any of those same proceeds." (*Id.*)

Most would agree that behavior such as that noted by the Government seems indicative of an intent to deprive NFO of the cheese proceeds. The course of action taken by Defendants appears less than ethical, to say the least. Nevertheless, even if these business practices are unsavory, this alone, even with strong evidence of criminal intent, cannot constitute a "scheme to defraud" under the mail and wire fraud statutes in the absence of a property right for the scheme to interfere with. *Pierce*, 224 F.3d at 165.

Since NFO was not deprived of anything in which it had a property right, Defendants did not violate § 1343 and thus are entitled to a judgment of acquittal as to Counts 2-7. Additionally, Defendants are entitled to a judgment of acquittal as to Count 1 because the conviction for conspiracy to commit money laundering cannot stand without the predicate offenses (that is, the wire fraud crimes).

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[31] NFO received proceeds from the sale of the cheese in the amount $186,670.91 in February 1996.

V. CONCLUSION

For the foregoing reasons, IT IS ORDERED that Defendants' "Motion[s] for Judgment of Acquittal or in the Alternative for Arrest of Judgment (Venue)" ("Venue Motions") is GRANTED;

IT IS FURTHER ORDERED that Defendants' "Motion for Judgment of Acquittal Pursuant to Rule 29(c) FRCrP and for Arrest of Judgment Pursuant to Rule 34 FRCrP" ("Materiality Motions") is GRANTED;

IT IS FURTHER ORDERED that the following motions are each DENIED AS MOOT: Defendants' "Motion[s] for Mistrial for Denial of Right of Counsel and for Mistrial (Green & Purtell)," Grisel's "Motion to Replace Counsel," David Herrington's[32] "Motion to Withdraw as Counsel," and the Government's "Motion Seeking Resolution of Rule 29 Motions and Other Pending Matters."

ROBERT H. CLELAND

UNITED STATES DISTRICT JUDGE

Dated: September 24, 2001

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[32] David Herrington is representing Grisel in this action.